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Master of Philosophy (MPhil) in Criminology & Criminal Justice

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**Challenging Challenges: A Metaphysical Redress of van den Haag's
Retributive Axiom – *Unequal Justice over Equal Injustice.***

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Research dissertation presented for the approval of the Senate in fulfilment of part of the requirements for the MPhil in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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ABSTRACT

For over thirty years Ernest van den Haag repeatedly asserted a controversial claim in favour of the death penalty. He argued that, regardless of the extent to which capital punishment sentences are unequally, arbitrarily, or even racially, maldistributed among offenders, capital punishment is always a morally valid sentence *in se*. His controversial claim is rooted in the theory of retributive justice, as he appeals to the offender's individual moral desert to justify capital punishment for the crime of (first-degree) murder. Thus, van den Haag summarised his claim into a logical axiom – that *unequal justice* (i.e. capital punishment) is always preferable to *equal injustice* (i.e. abolitionism or life imprisonment). Van den Haag challenged abolitionists to refute his axiom by using his same retributive foundation. This is something abolitionists have been unable to do without resorting to consequentialist or hybrid reasoning. This theoretical dissertation has sought to find the flaws in van den Haag's logic and dispute his axiom on his own retributive grounds utilising, particularly, racial maldistribution of capital sentences. In this dissertation four attempts are made to dispute his axiom and the following arguments are identified: (i) an internal inconsistency within van den Haag's axiom; (ii) an argument for an implicit illegitimate authority, as well as (iii) an argument for an explicit illegitimate authority; and finally, (iv) an argument concerning the subjective experience of the offender when presented with a sentence of death. It is, however, the final argument that carries the most weight in disputing van den Haag's axiom. Thus, this dissertation has met his challenge by rendering the death penalty immoral *in itself*, even when the justification for the death penalty is retributive.

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DEDICATION

For Gladys Gqaliwe

University of Cape Town

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CHAPTER I

INTRODUCTION

I.I. Introduction

The allure of retribution to justify punishment is undoubtedly as ancient as the notion of punishment itself (whereby, retributive principles will be discussed more fully in Chapter II). Even those who shun systems that adhere to retributive punishment may acknowledge that humankind's basic moral intuition – that individuals deserve to be punished for wrongdoings they have committed – should be adopted in some way or another for the purpose of maintaining social order. An additional appeal of retributivism is that it acts as a counter-position to consequentialist justifications of punishment, where one can punish the innocent if the overall outcome would be positive for the society. Although an intuitive notion of desert may not be an entirely persuasive or a sufficient justification for punishment, it is hard to accept that retribution has no justificatory weight.

Retribution does not justify punishment of any and all kinds. Particular kinds of punishment, such as torture, are impossible to justify even by ascribing to retributive principles. Retribution is not taken merely as an act of vengeance here. Instead, *retribution* is understood as a moralistic reaction to harm inflicted by a wrongdoer, paying tribute to the very idea of what is just (Moore, 1995). One may note Herbert Morris's prominent description of retribution. Morris (1968) explicated that:

A person who violates the rules has something the others have – the benefits of the system – but by renouncing what others have assumed, the burdens of self-restraint, he [*sic*] has acquired an unfair advantage. Matters are not even until this advantage is in some way erased. (p. 478)

Thus the infliction of punishment is deemed a method in which the improper benefit gained by the offender is expunged in order for the universal moral fabric, order or system, to revert to a state of equilibrium. However, if the aim of retributivism is to rectify the moral balance then acts that are inherently *immoral*, such as torture, will hinder the achievement of that aim. Hence, only the infliction of morally acceptable punishments can serve justice.

This aspect – the morality of punishment – reveals part of the perennial death penalty debate and is the focus of this work (to be explored more fully in Chapter III). The aspect of the death penalty focused on here is the inherent morality or immorality of capital punishment. Is it morally sound to state that some crimes – such as *first-degree murder* in the American legal context or *murder* in the South African legal context – are so heinous that only death at the hands of the state can rectify this societal infringement; or is the death penalty *in se* an immoral punishment regardless of the severity of the crime? Abolitionists argue the latter for several reasons. In this dissertation, however, the core argument posited is that the death penalty is an unacceptably immoral form of punishment due to the arbitrary or maldistributed nature of capital sentences for offenders.

The idea that capital punishment is constitutionally, if not morally, unacceptable has been argued in numerous court decisions; however, the most pertinent cases shall be mentioned in this dissertation (Chapter III). The notion that arbitrary or maldistributed death sentences are unconstitutional were argued in *Furman v. Georgia* (1972) which, in effect, abolished the use of capital punishment in most of the United States of America (U.S.), and was similarly used in *State v. Makwanyane* (1995), which abolished capital punishment in South Africa (S.A.). Moreover, those claiming that punishment is immoral and unjust due to the maldistribution of sentencing among wrongdoers often cite racial bias as the most compelling motivation for that maldistribution. This is reminiscent of the *McCleskey v. Kemp* (1987) case. Abolitionists argue that as racial discrimination is evidenced to exist in capital sentencing, thereby causing a racist maldistribution of death sentences, this form of punishment is an unacceptably immoral and unjust form of punishment.

In contrast, Ernest van den Haag, a staunch advocate for the death penalty for several decades, used retributive reasoning as a counter-argument (Chapter IV). He claimed that although maldistributed sentences due to racial discrimination (or other forms of prejudice) are wrong, the death sentence *in itself* is not shown to be immoral and unjust. The reason is that, although some (first-degree) murderers will not be punished appropriately for their crime, at least some of those who *deserve* to be executed still receive the death penalty (van den Haag, 1986).

Van den Haag emphasised that desert pertains to the individual, and as punishment is an individual matter, one that does not pertain to races, nationalities, sexes, and so on (see also Reed, 1999; Reuther, 1996), the only pertinent moral concern is determining which individuals deserve punishment and imposing that punishment. For instance, if there were five wrongdoers all of whom deserved death as a punishment, but only one wrongdoer received it, the wrongdoer so punished was not treated unjustly nor was the penalty immoral because the others were not chosen. Rather, the only injustice was that the other four wrongdoers did not receive the punishment they deserved.

For van den Haag, then, it is not the maldistribution of punishment that creates the injustice, but rather the failure to impose punishment on as many wrongdoers as possible. So, as a higher degree of *injustice* is ultimately brought about by abolishing the most appropriate punishment, there is no logical reason why the death penalty *in itself* is immoral or unjust and thus should be abolished. Hence van den Haag's axiom is that regardless of the maldistribution of capital sentencing for (first-degree) murderers (i.e. *unequal justice*) it is always preferable to abolishing (or replacing with life imprisonment) the most appropriate sentence, even if its distribution were theoretically equal (i.e. *equal injustice*).

The notion of individual desert provides van den Haag with a strong and logical retributivist justification for his argument in favour of capital punishment as paraphrased in his axiom. However, the idea that the death penalty would *still* be considered a moral and just form of punishment despite it being distributed in an arbitrary or even racist manner is deeply controversial. Nonetheless, if van den Haag's argument is valid then a system of capital sentencing, regardless of any maldistribution and racial discrimination (Liebman, Fagan, & West, 2000), delivers morally just treatment to those who deserve and receive capital punishment.

I.II. Aim

For decades van den Haag challenged abolitionists to demonstrate flaws in his logic. Abolitionists have to date been unsuccessful in meeting this challenge without referring to consequentialist or hybrid reasoning – and van den Haag insisted as a main pre-condition that any valid challenge to his axiom cannot make use of such reasoning. The aim of this dissertation, then, is to meet van den Haag's retentionist challenge by readdressing the philosophical and moral value of his argument and axiom: that *unequal justice is always preferable to equal injustice*. Van den Haag, in fact, claimed that his axiom was irrefutable (see van den Haag, 1986; van den Haag & Conrad, 1983).

The core argument, then, is that in a situation of unequal justice van den Haag violates his own retributive principles and therefore defines capital punishment as retributively immoral and unjust *in itself*. The infliction of such a morally unacceptable sentence would hinder the rectification of the moral balance – the aim of retributivism and van den Haag. Retributive principles, however, have on countless occasions defended his axiom against abolitionist attacks. As such, four attempts to challenge van den Haag's axiom – without deviating from his main pre-condition – are made in this dissertation. If this dissertation is able to render the death penalty as immoral *in se*, on the same retributive foundation as van den Haag, his axiom would thus be challenged. This dissertation, then, is a retributive argument in favour of abolitionism or life imprisonment (i.e. equal injustice) as opposed to the use of capital punishment (i.e. unequal justice).

I.III. Method

This dissertation is a theoretical exploration. The development of retribution is traced in order to define the underlying theoretical principles applicable to van den Haag's axiom. Scholarly literature and legislative materials in relation to capital punishment, maldistributed sentences and racial discrimination are examined. On occasion empirical information will be presented, but only when it affects theoretical concepts. A clear exposition of van den Haag's position will be followed by an analysis of his axiom in order to demonstrate philosophical and theoretical flaws based solely on the theory of retribution.

Van den Haag's axiom will be challenged by the utilisation and modification of existing arguments, as well as the development of new ones, in order to advance theory in this area of criminology and jurisprudence. Four arguments will be presented in ascending order of strength: (a) an internal contradiction will first be sought within van den Haag's logic to prove maldistributed punishments, in general, are unjust on retributive grounds (Chapter V); (b) secondly, an attempt will be made to show that the judicial authority becomes implicitly illegitimate and therefore unable to morally impose the death penalty as it is perceived by the public to ignore issues of racism, or even indirectly endorse racism, in capital sentencing (Chapter VI); (c) further, the importance of a legitimate authority to impose just capital sentences is philosophically and concretely explained and such judicial authority is demonstrated as an explicitly illegitimate source due to a direct violation of its mandate for impartiality (Chapter VII). This is an extensive argument and the response to it is provided in Chapter VIII. Finally, (d) the argument will be put forward that van den Haag knowingly violates the *lex talionis* principle – a vital component for retributivism – by readily dismissing the notion of subjective experiences by some individuals sentenced to death (Chapter IX). The chapters in this dissertation, unlike those of an empirical study, are ordered by a logical relationship rather than by chronology. The next chapter will extrapolate the theory of retribution which is the foundation for van den Haag's axiom and challenge.

CHAPTER II

THEORETICAL RETRIBUTION

II.I. The Fusion of Legal and Moral Theory

What does a legislative sentence have to do with morality? It is important to note for obvious reasons that this dissertation does not maintain the position that what is legal is automatically deemed morally legitimate. A stronger connection is required and provided. Legislative punishment attempts to punish in a reasonable way those who have broken the law. Although traditionally this outlook is accepted, what is viewed as reasonable punishment is questionable.

The practical implementation of punishment needs to be *justified on moral grounds* because punishment, being an intentional and preventable infliction of harm (Honderich, 1970), is itself 'immoral' (Duff & Garland, 1994). Punishment necessitates the reduction of individual liberty which, without some agreeable form of legislation, is even more quickly deemed morally iniquitous (Cavadino & Dignan, 1997; Hart, 1963; Sullivan, 1996).

Although there is perpetual disagreement about the factors involved in distributing and determining appropriate individual sentences (Mill, 1867), agreement on punishment in general as a legitimate practice requires an underlying moral foundation. Thus moral theory provides the benchmark for the practical implementation of judicial sentences, often encompassing its purpose and expected outcome (Duff & Garland, 1994; Hart, 1968a; Morris & Tonry, 1990).

Moreover, it is common for officials in the criminal justice system, such as judges, juries and prosecutors, to justify their decisions by making reference to purposes extracted from moral theory. Moral theories used in the context of judicial punishment can be referred to as moral legal theories. Although there is a clear association between legal theory and moral theory in general, which moral theory of punishment should be used – and when – is unclear. In this dissertation the moral legal theory of punishment that is applied is deontological retributivism, as it is the theoretical approach used by van den Haag.

II.II. Consequentialism and Deontology

There are numerous moral philosophies that may provide alternative theoretical perspectives to legal punishment. These perspectives provide alternative views as to the reason for, and expected outcomes of, punishment. Commonly, the philosophical and theoretical debate of punishment has been largely shaped by the contrast between consequentialism and deontologicalism. For this reason the scope of this dissertation does not include other moral philosophies such as feminism's ethics of care (Gilligan, 1982; Held, 1993, 2005), Aristotelian virtue ethics (Hursthouse, 1999; Pojman & Fieser, 2009), egoism (Rand, 1964), and altruism (Seglow, 2004). The most vital difference between the two aforementioned moral constructs is their temporal approach to wrongdoing and punishment.

II.II.I. The Consequentialist Perspective

Consequentialism is a forward-looking approach. Consequentialists justify an action based on the measure of potential (utility or) beneficial social effects derived from its outcome (Broad, 1930). For a consequentialist act to be morally just, the utility gained must outweigh the overall disutility of imposing that act. Thus consequentialist theories are commonly known as utilitarian theories.

Some scholars discern a version of utilitarianism as *reductivism* due to its predominance with reducing criminal activity (Cavadino & Dignan, 1997; Walker, 1985). Concerning legal punishment, reducing, deterring and preventing criminal acts is the aim (or utility) of utilitarianism. There are several legal theories that achieve these ends, such as general and individual deterrence, rehabilitation, and incapacitation (see Russell, 2007; Sim, 2009, Zimmerman, 2004; Zimring & Hawkins, 1995). Although these theories are not the focus of this dissertation, consequentialism is important to understand in order to identify forbidden consequentialist counter-arguments against van den Haag. In direct juxtaposition to consequentialist views, is deontology.

II.II.II. The Deontological Perspective

Deontologicalism is a backward-looking approach. For deontologists, the moral correctness or incorrectness of an act rests on the act *itself* and not on any potential future outcomes resulting from that action (Broad, 1930). One common deontological approach to punishment is retributivism. Retributivism is retrospective and thus strictly non-consequentialist. Retributive punishment has an intrinsic moral worth when acting as a counterbalance to past wrongdoings without the justification of potential future outcomes (Duff, 1996).

So, from a retributivist point of view, the practical implementation of punishment is deserved, just, and a morally correct act as it repairs the moral fabric or balance that was disrupted by the criminal act, and is thus often called *just deserts* (Cavadino & Dignan, 1997; von Hirsch, 1976, 1992). The focus of this dissertation, however, is the determination of the validity of deontological retributive punishment as a justifiable moral argument favouring the death penalty, particularly when sentences are maldistributed along racial lines.

II.II.III. Hybrid Theories

Retributive and consequentialist or utilitarian theories can merge to create hybrid or mixed theories of punishment (von Hirsch, 1993; Walker, 1991). Hybrid theories of punishment are appealing and thought-provoking substitutes for *pure* forms of retributivism and utilitarianism. However, these hybrid theories tend not to provide any fundamentally new developments for the original theories (Edney & Bagaric, 2007). The attraction of using these theories is drawn from controlling one theory's reasoning with that of another. Because van den Haag's challenge is rooted in pure retributivism, hybrids, like consequentialist arguments, are also not permitted as valid counter-arguments.

II.III. A History of Retribution

There seems a natural human propensity for retribution – where ‘the punishment must fit the crime’. In the past, most cultures or nations have ascribed to the idea that the punishment inflicted on the offender must be equivalent to the

harshness of the offence. One can uncover retributive principles expressed as far back as in the Old Testament, written between 1100 and 100 BCE (“Old Testament”, 2009). Both Deuteronomy 19:21 and Exodus 21:24 refer to the manner in which punishment should be measured: “eye for [an] eye, tooth for [a] tooth, hand for [a] hand, foot for [a] foot” (Revised Standard Version).

Moreover, the idea that punishment can be quantified to ensure justification is noted elsewhere. For instance Matthew 7:2 in the New Testament states: “with the measure you use, it will be measured to you” (Revised Standard Version), and in the Babylonian Talmud, the phrase *middah keneged middah* is directly translated into “measure for measure” (Epstein, n.d., para. 7). Both refer to an ancient *lex talionis* principle of retribution, and are considered the ‘Golden Rule’ of morality and ethical punishment (Kohler & Hirsch, 2002).

One can trace legalised retributive doctrine even further back to an extant seven foot slab of basalt stone from Babylon dated 1760 BCE, known as the Codex (or Code of) Hammurabi (Mieroop, 2004). Even more is the oldest intact code of law, being the Sumerian Code of Ur-Nammu created in 2750 BCE (Kramer, 1963). According to Samuel Noah Kramer, the renowned Assyriologist, this codex has in it the oldest inscribed capital sanction against murder, as the first law translated is: ‘If a man commits a murder, that man must be killed’ (Kramer, 1981).

The point made here demonstrates how ancient van den Haag’s retributive appeal to justify executing murderers is. Moreover, all the laws in the Codex Hammurabi are inscribed casuistically, thus if X commits crime C , X deserves punishment P . Not only was this structure considerably advanced for its time, so too was the less rigid (or proportional) interpretation of the *lex talionis* principle. For example, where murder was punishable by death, acts of bodily harm were punishable by fines and not by an arranged assault upon the offender by the legal authorities (Hammurabi, trans. 2005). Similarly, although van den Haag claimed murderers deserved to be executed, he did not adhere to a literal *lex talionis* for every crime as he understood its flaws.

II.IV. *Lex Talionis*: Literal Adoption and Proportional Adaptation

As Kant (1797/1996) so poignantly stated:

For the only time a criminal cannot complain that a wrong is done him [*sic*] is when he brings his [*sic*] misdeed back upon himself [*sic*], and what is done to him [*sic*] in accordance with penal law is what he [*sic*] has perpetrated on others, if not in terms of its letter at least in terms of its spirit. (p. 130)

Retributive theory maintains that the wrongdoer's actions justify not only the punishment but the *degree* of punishment imposed. Commonly, the *lex talionis* principle is the primary core retributive argument for any particular sanction. The idea that an individual deserves to receive a punishment equal to the harm that was suffered by his or her victim does not sound absurd. However, if one were attempting to impose a literal version of the *lex talionis* stringently, the outcome may be quite bizarre.

II.IV.I. Outcomes of Literal *Lex Talionis*

The *lex talionis* 'eye for an eye' principle needs to be adapted to ensure that moral desert and punishment are commensurate. The use of the literal interpretation, in which offenders deserve – and can only morally receive – the punishment *equivalent* to what the victim suffered, is highly problematic. First, applying this principle can at times be conceptually difficult for reasons such as an absence of a victim or the nominal nature of the crime. For instance, circumstances of reckless endangerment or tax fraud seem difficult to equivalently impose on the offender (Davis, 1986).

Secondly, the imposition of an equivalent punishment may be literally impossible. An arsonist who has no property or a kidnapper who has no children cannot be punished equivalently (Daube, 1947). Thirdly, some punishments appear morally insalubrious, such as raping a rapist, particularly a child molester, or dealing with someone who engages in bestiality. Even if these punishments were equivalent and so technically appropriate, re-structuring judicial sentencing in this manner, having an official state rapist for example, seems unsavoury in any contemporary society.

Fourthly, to equivalently administer moral desert, numerous criminal justice procedures may need to be reconsidered. For instance, suspended or reduced sentences, executive pardons or clemency, and statutes of limitations may need to be revised (Shafer-Landau, 2000). Moreover, the rules for collecting evidence would conflict with a literal *lex talionis* when the evidence demonstrated the guilt of the perpetrator, but that evidence was improperly gathered (Shafer-Landau, 2000).

Lastly, in cases such as genocide what equivalent punishment is there? Although for Kant “every murderer ... must suffer death [for there to be] justice” (Kant, 1797/1996, p. 107), what punishment balances out atrocities by Nero (37-68) (Champlin, 2003), Stalin (1878-1953) (Rayfield, 2005), Hitler (1889-1945) (Waite, 1993), and ‘Pol Pot’ (1925-1998) (Short, 2005)? Even though Kant suggested banishment and social isolation (*bürgerlichen Gesellschaft*) as a fate worse than death for crimes against humanity (*Verbrechen an der Menschheit*) (Kant, 1797/1996, p. 130; see also Napoleon’s preference for execution in Robinson, 1906), this is impractical and morally questionable, such as quarantining *each* individual perpetrator for acts of genocide on their *own* uninhabited island with no basic human rights provision for sustenance or shelter (Fichtelberg, 2005).

II.IV.II. Shifting to Proportional *Lex Talionis*

It is safe to say that most retributivists, even those that support capital punishment like van den Haag, discard a literal *lex talionis* for a proportional one. Here the wrongdoer deserves to be punished by a measure *approximate* to the harm caused (Murphy, 1979). This notion has its own difficulties in determining the extent of approximation.

Attempts to create punishment based on interpersonal measures of harm by calculating similar suffering endured (as opposed to using the same type of act as the wrongdoer) have inevitably failed (see Reiman, 1985). For instance, Robert Nozick and Joel Feinberg both developed unsuccessful means to establish a measure of deserved punishment based on the culpability of the wrongdoer and the harshness of the crime (Feinberg, 1995; Nozick, 1981). It is not necessary to discuss the details of their equations or lists of criteria, respectively, in this dissertation. The purpose is merely to demonstrate that the proportional connection between the offence and the

punishment is unclear and problematic – and even more so when a literal version of *lex talionis* is applied.

Retributivists may be able to justify punishment in a broad sense but their arguments seem to lack strong philosophical instruction for the implementation of specific punishments (see Moore, 1997). This is the point at which some have introduced hybrid theories of punishment. However, Jeffrie Murphy (1979), a contemporary retributivist, sweeps this aside, as does this dissertation:

Surely the principle [*lex talionis*], though requiring likeness of punishment does not require *exact* likeness in all respects. There is no reason *in principle* (though there are practical difficulties) against trying to specify in a general way what the costs in life and labour of certain kinds of crime might be, and how the costs of punishments might be calculated, so that retribution could be understood as preventing criminal profit. And it is certainly possible retributively to *rank* punishments so that the most serious punishments are matched with the most serious offenses. (p.79)

So, if retributivism utilises the *lex talionis* literally in order to justify punishment, its application in respect of certain crimes such as culpable homicide may make the theory absurd. If retributivism does not hold any form of *lex talionis* to justify punishment, the theory is baseless, as it would have difficulty justifying any penalties (Finkelstein, 2002). This means that it is not necessary for the punishment and the offence, to match exactly, but the degree of punishment must be reasonably matched to the severity of the wrongdoing. Hence, the *lex talionis* as used in retributivism can be adopted as: *The more severe the offence, the more severe the punishment*. Thus, the most severe offence must be met with the most severe punishment.

II.V. Basic Retributive Principles

Although the core *lex talionis* principle of retributivism has been discussed, there are many versions of retributivism. Hart's 'crude model' demonstrates three basic underlying principles that are common for a multitude of retributive theories, including that of van den Haag (Hart, 1968a). It is appropriate, here, to interpret Hart's underlying principles to retributivism from a Kantian perspective as this is the perspective to which van den Haag subscribes. There are, however, other similar

perspectives, such as that of Hegel, which is not mentioned here (see Beiser, 1993, for a collection of essays; Hegel, 1821/1967).

II.V.I. The Principle of Wilful Wrongdoing

Hart's first principle asserts that the justification of the punishment of a wrongdoer resides in the extent to which a wrongdoer can be blamed for his or her actions and willingness to commit the action (Hart, 1968a). Hence, a rational individual may justly incur punishment only if his or her actions were knowingly and intentionally harmful. This, of course, raises issues with regards to acts of negligence but these are beyond the scope of this dissertation.

As non-rational beings are not considered to have wilfully, knowingly and intentionally caused harm, they are not subject to the same requirements for punishment. As such, the non-rational beings that may fall into this category are animals, children or minors, persons with mental disabilities, and persons with psychological impairments. The severity level of the last two may require some discussion, but not in this dissertation.

This abstract principle, above, is seen in practical legal cases. In *Atkins v. Virginia* (2002), for instance, the U.S. Supreme Court ruled the execution of persons with mental disabilities to be unconstitutionally "cruel and unusual" (p. 321), and, that "within the world community, the imposition of the death penalty for crimes committed by mentally [disabled] offenders is overwhelmingly disapproved" (p. 316). Similarly, in *Roper v. Simmons* (2005), the U.S. Supreme Court ruled the death penalty unconstitutional for offenders under the age of 18 (minors) (p. 1198). In this case, Justice Kennedy stated that:

Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blame-worthiness is diminished, to a substantial degree, by reason of youth and immaturity. (*Roper v. Simmons*, 2005, p. 1196)

18th century philosopher of epistemology, metaphysics, ethics and logic, Immanuel Kant (1724-1804), stressed the importance of this particular principle with regards to justifying punishment by the state (see Guyer, 1992, for a collection of

essays). He placed emphasis on the wilfulness of an individual and the rationality that solidifies the use of that will (or autonomy). Kant (1785/1993) stated that:

Every rational being, exists as an end in himself [*sic*] ... not merely as a means to be arbitrarily used by ... [the] will [of others]. He [*sic*] must in all his [*sic*] actions, whether directed to himself [*sic*] or ... to other rational beings, always be regarded at the same time as an end [R]ational beings are called persons in as much as their nature already marks them out as ends in themselves (p. 36)

II.V.II. The Principle of Proportionality

Hart's second principle indicates that the kind and severity of the punishment is correlated to the will of the offender (Hart, 1968a). As the offender has willed the crime he or she has willed the punishment. Hence, there must be some kind of equivalence between the punishment and the imposition of will, or rather, the offence.

The manner in which the punishment is matched with the wrongdoing tends to depict the version of retributivism applied. Kantian retributivism, for instance, is based on the 'equality principle'. Kant (1797/1991, as cited in Anderson, 1997) described a just quotient of punishment as follows:

But what kind and what amount of punishment is it that public justice makes its principle and measure? None other than the principle of equality ... to incline no more to one side than to the other. Accordingly, whatever undeserved evil you inflict upon another within the people ... you inflict upon yourself. If you insult [another], you insult yourself; if you steal from [another], you steal from yourself; if you strike [another], you strike yourself; if you kill [another], you kill yourself. (para. 5)

He further states that "only the law of *retribution* ... can specify the equality and the quantity of punishment" (Kant, 1797/1996, p. 105). Kant suggests then that the severity of the wrongdoing ought to be equivalent to the severity of the punishment. This is reminiscent of the *lex talionis* principle, mentioned earlier, whereby the punishment's severity must increase with the severity of the offence, and thus, the most severe offences must be met with the most severe punishments. However, this principle highlights the fact that offenders should not receive *less* punishment than they deserve nor receive *more* punishment than they deserve, for the punishment to be just.

II.V.III. The Principle of Inherent Justice

The third principle is fundamentally *dissimilar* to consequentialism. This is a declaration that it is in itself just to punish those who have intentionally committed wrongdoings, regardless of the potential social benefit or loss (Hart, 1968a). Kant (1797/1996) explained that:

Punishment by a court ... can never be inflicted merely as a means to promote some other good for the criminal ... or for civil society. It must always be inflicted upon [them] *only* because [they have] committed a crime [They] must previously have been found punishable before any thought can be given to drawing from his [*sic*] punishment something of use for himself [*sic*] or his [*sic*] fellow citizens. (p. 105)

When the wrongdoer intentionally and wilfully commits an offence, he or she understands *a priori* their act to be an offence. So punishing the wrongdoer gives credence to the rationality of that person, and places due emphasis on the importance of that person's existence. The offender is not viewed as the means whereby the social order will be repaired; a precarious being that needs force to be restrained or healed (Hegel, 1821/1967), or an individual 'to be made an example of', but rather, one who deserves to have his or her will respected. This notion of retributive justice is the foundation of van den Haag's axiom and challenge.

II.V.IV. The Principle of the Necessity of Punishment

Although in Hart's 'crude model' there are three basic underlying principles, a fourth principle is also added and applicable to a Kantian version of retribution, in what Hart discerns as the 'severe model' of retribution (Hart, 1968a). This principle asserts that it is not only acceptable and inherently just to punish offenders, but it is *mandatory* – failure to do so brings about injustice (Hart, 1968a). Kant (1797/1965, as cited in Anderson, 1997) argued that:

Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be

regarded as accomplices in this public violation of legal justice. (para. 12)

For Kant and van den Haag, then, punishment is mandatory. In-depth discussions of Kantian perspectives are unnecessary here. However, the brief outline that has been given is important, as this dissertation implicitly and, at times, explicitly refers to the principles above to meet van den Haag's challenge.

II.VI. Basic Social Contractarian Principles

Retributive theory is often considered an appealing theory of punishment as individuals are held morally accountable. Also, judicial institutions that distribute penalties display recognition of individuals' agency. However, scholars have cited retributive theory as a mere validation of vengeful behaviour, a non-deontological undertone. Most retributive theorists and contemporary political philosophers sought to mete out this assertion by underlining retributive theory with social contractarianism (Murphy, 1978; Murphy & Hampton, 1988).

II.VI.I. The Natural Equality Principle

Like basic retributive principles, social contractarian theory comes in many forms and has basic common underlying principles. The first principle indicates that all humans are innately equal, but the conception of that equality differs depending on the theorist. For instance, the 17th century political philosopher Thomas Hobbes (1588-1679) maintained that humans are equal because all humans are equally susceptible to danger from one another (see Malcolm, 2002). Hobbes (1651/1985, as cited in Anderson, 1997) claimed that:

When all is reckoned together, the difference between [one another] is not so considerable [Regarding] the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others And as to the faculties of the mind ... I find yet a greater equality among men, than that of strength. For prudence, is but [life experience]; which equal time, equally bestows on all men, in those things they equally apply themselves unto. (para. 17)

Additionally, the 17th century philosopher John Locke (1632-1704) placed emphasis on the equal rights that humans ought to have, based on a hypothetical

original 'state of nature', where no individual has more or less power, control or prestige than anyone else (Waldron, 2002). Locke (1690/1988, as cited in Anderson, 1997) suggested that:

To understand political power right, and derive it from its original, we must consider what state all [people] are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other [person]. A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another. (para. 18)

The point made here is the same. Humans are inherently equal whether it is due to our equal susceptibility to harm or due to our common desire to be treated as having equal rights, and freedom from the domination of others. So, no individual or institution has the moral authority to legitimately enslave a select group of citizens or be free from laws when others must adhere to them (see Rawls, 1971).

II.VI.II. The Mutual Benefit Principle

The second common underlying principle for social contractarianism asserts that a governing body, and particularly a criminal justice system, is an organism of accumulated social rules and / or laws that benefit the constituents of a society in a mutual way. The purpose of adherence, and what the rules and / or laws constitute, varies between social contractarian theories. For instance, in a Hobbesian society, the rules and / or laws are mandatory *because* they are mutually beneficial (Hobbes, 1651/1985).

Alternatively, in a Lockean society, the rules and / or laws are mutually beneficial and mandatory, but the obligation to adhere to them is not due to them being mutually beneficial (Locke, 1690/1988). Rather, all the members of a society would agree to implement and adhere to reasonable mutually beneficial social rules and laws, as well as a legitimate authority to police the constituents, in the hypothetical 'original position'. This means that when a social structure or governing body comes into existence, citizens could not know their potential financial position, career prospects, physical attributes, health status, and the like, while shrouded by the 'veil of ignorance' (see Kymlicka, 2002).

The reasonable and impartial nature of such a governing body is that each individual is advantaged and disadvantaged. The advantages include those gained in any regulated society, such as safety and security of property and self (see Hobbes, 1651/1985; Locke, 1690/1988). Disadvantages include the limitations placed on any nihilistic and hedonistic intentions. Thus, for each individual, agency is propelled within the society to develop one's passions but is restrained by social order. It is the combination of the above two contractarian principles that express why retributive justice is not mere revenge, but is a deontological means for legislative punishment.

II.VII. Concluding Retributive Theory

For the retributivist, the rationale of legislative punishment as well as the criterion for designing and implementing judicial institutions, policy and laws, is that wrongdoers receive their just deserts. As such:

Judicial punishment can never be used merely as a means to promote some other good for the criminal ... or for civil society, but instead it must in all cases be imposed on him [*sic*] only on the ground that he [*sic*] has committed a crime. (Martin, 2005, p. 174)

This pays tribute to the rationality, will, and existence of the offender. The punishment must also be proportionate to their crime (Hampton, 1991; Kleinig, 1973; McCloskey, 1965; Nozick, 1981). So, sentencing is morally justified if, and only if, the more severe offences are met with the more severe punishments and the punishment is not more or less than the wrongdoers deserve (Rachels, 2007).

As a clearer understanding of the intricacies of retributivism has been established, the next chapter introduces and links retributivism, capital punishment and racial discrimination within the context of American and South African law. Reference to both S.A. and the U.S. is deliberate as (i) capital punishment has been utilised in both countries and (ii) both share a comparable history of racial discrimination, segregation and ideology (see Fredrickson, 1981; Hamilton, Huntley, Alexander, Guimarães, & James, 2001; Kende, 2006; see also Banks, 2003; Dubow, 1995; Sears, Sidanius, & Bobo, 2000; Turrell, 2000; Washington, 2006).

CHAPTER III

CAPITAL PUNISHMENT AND RACIAL DISCRIMINATION

III.I. Introducing Capital Punishment

Capital punishment, also known as the death penalty, is a judicial judgment following which an individual citizen is executed by the state or country. The offences that the courts deem worthy of capital punishment are often termed ‘capital offences’ or ‘capital crimes’. The word ‘capital’ is from the Latin *capitalis*, literally meaning, ‘concerning the head’. Thus, capital offences were traditionally punished by beheading the perpetrator. For instance, on 10 October 1789 at the height of the French Revolution a method of ‘humane’ execution – later to become extremely popular – whereby a device for beheading persons, consisting of a weighted blade set between two upright posts, was proposed by and named after physician Joseph-Ignace Guillotin (1738-1814) (Kershaw, 1993).

In almost every society capital punishment has been practiced by various means. Methods of execution have included stoning, beheading, hanging, drawing and quartering, the electric chair, the gas chamber and lethal injection. Currently, legal use of the death penalty varies among countries and states. For example, in 1950, the Council of Europe adopted the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR), whereby, Article 2 affirmed the ‘right to life’, and Protocol 13 called for the complete abolition of the death penalty – which was implemented in most of Europe (see Council of Europe, 1950). The United States still uses capital punishment sporadically, in some states, while South Africa has banned this practice entirely. The position of the U.S. and S.A. with regards to the death penalty will be discussed in this dissertation due to their common use of capital punishment and comparable history of racial discrimination.

III.II. Debating Capital Punishment

The array of divergent country and state death penalty practices highlights the multitude of arguments for and against it that perpetuate the ongoing debate. The

use of capital punishment in general will not be debated here, but rather the controversy surrounding it will be outlined briefly. Those who seek to end capital punishment or keep the sanction banned are called abolitionists. Those who seek to retain the death penalty or re-instate it are called retentionists.

Some retentionists argue that capital punishment acts as a stronger deterrent from criminality than life imprisonment (see Brumm & Cloninger, 1996; Dezhbakhsh, Rubin, & Shepherd, 2003; Dezhbakhsh & Shepherd, 2006; Keckler, 2006; Mocan & Gittings, 2003; Sorensen, Wrinkle, Brewer, & Marquart, 1999; Yang & Lester, 2008; Yunker, 2002). Abolitionists respond that life imprisonment can be an equally effective deterrent (see Berk, 2005; Donohue & Wolfers, 2005, 2006; Fagan, 2006; *Public Policy*, 2005, Weisberg, 2005).

Some abolitionists argue that capital punishment can irreversibly execute innocent individuals (see Amnesty International, 2008; Death Penalty Information Center, 2009; Dieter, 2004). Moreover, they argue that the financial cost of life imprisonment is less than that of the death penalty, while retentionists argue to the contrary (Zimmerman, 2004; see Kasten, 1996, for an extensive explanation). Furthermore, some abolitionists hold that advocating murderous sentences may induce violent inclinations in jurors, officials and general society. This is known as the 'brutalisation hypothesis' (see Cochran, Mitchell, & Seth, 1994; Sorensen et al., 1999; Thompson, 1997).

Others argue that capital punishment negates the value, respect and dignity attributable to human life (Devine, 2000). However, retentionists suggest that only in ending the life of a murderer is the sanctity and dignity of (the victim's and sometimes the offender's) life affirmed (Koch, 1985). Abolitionists argue that the government or state has no inherent right or authority to violate a wrongdoer's right to life (Winston, 2002), and others argue that capital sentencing is arbitrarily distributed or maldistributed due to various gender, religious, social, and racial biases (Holcomb, Williams, & Demuth, 2004; Lanier & Acker, 2004; see also Calvert, 1992; Davis, 1997). Some retentionists, on the other hand, use biblical or literal retributivism as a moral justification to execute (first-degree) murderers in the strict 'eye for an eye' fashion (Melton, 1997).

There are numerous considerations to contend with in assessing and critiquing capital punishment, not merely individually but also in combinations (see Bedau, 1999). However, the primary considerations for this dissertation are retributivist justifications for capital punishment, and arbitrary distribution and racial maldistribution in capital sentencing.

III.III. Public Consensus and Capital Punishment

Due to the multiplicity of arguments supporting or rejecting the death penalty, public desire to retain or abolish the death penalty is typically not fixed. For instance in abolitionist countries, such as in Jamaica and Sri Lanka (see Dias, 2004; Richards, 2008), heinous attacks of terrorism or grisly murders have terminated the moratorium on capital punishment. Alternatively, in retentionist countries, moratoriums on capital punishment were often attributed to shifts in political rule from authoritarian to democratic, such as in South Africa. In the United States, however, some states have banned the death penalty, Michigan being the first in 1847; while others, such as Texas, currently administer capital punishment (see Bonner & Fessenden, 2000).

Additionally, public opinion on the death penalty tends not to be one-sided within an abolitionist or retentionist country or state. For example, between 1996 and 2000 public support for capital punishment declined from a longstanding 75 per cent to an approximate 65 per cent in the U.S. (Gross & Ellsworth, 2003, p. 11). Moreover, a 2005 Gallup Poll conducted in the U.S. reported that 64 per cent supported capital sentencing for murderers. This was found to be the lowest percentage of approval in 27 years (Saad, 2005).

This reduction in support for the death penalty can also be seen in specific groups for which capital sentencing is repealed, such as juveniles or persons with mental disabilities. Although some have attributed this decline to increased media portrayals of innocent individuals being executed, others attribute the drop in American public support to the view that capital punishment is an ineffective deterrent (see Dardis, Baumgartner, Boydston, De Boef, & Shen, 2008; Fan, Keltner, & Wyatt, 2002). For instance, in 2004, 62 per cent of Americans were recorded as

stating that the death penalty has no deterrent effect on murder, an increase of 21 per cent from 1991 (Death Penalty Information Center, 2004).

Despite the decline of support in the U.S., the majority view still tends to favour the use of capital punishment. For instance, a survey conducted in 2006 by ABC News reported that 65 per cent of Americans favoured the death penalty. This figure was found to be consistent in the light of other 2000 ABC News surveys (ABC News/Washington Post, 2006). Moreover, a 2006 American Gallup Poll indicated that 60 per cent considered the application of capital punishment as fair while 51 per cent of the public believed that capital sentencing should be used *more* frequently (Gallup Poll, 2006a, 2006b). Furthermore, in a recent American Gallup Poll from 2008 approximately 64 per cent favoured capital punishment for murderers, with 30 per cent against, and five per cent undecided (Gallup Poll, 2008).

Correspondingly, South African opinion on the death penalty has, for many years, been largely in favour of its use. In fact, 71 per cent of the general population polled supported the return of capital punishment in 1997 (Bentele, 1998; Hunter-Gault, 1999). Even in the court case that finally ended the application of the death penalty in South Africa, the Attorney General stated that for crimes of heinous murder, the South African public did not consider capital punishment an inhumane or cruel punishment (*State v. Makwanyane*, 1995, p. 431, para. 87; see also Bentele, 1998).

Moreover, 72 per cent of South Africans polled favoured re-instating the death penalty in 2006 (Angus Reid Global Monitor, 2006), and in 2007, Judge Dennis Davis commented that 85 per cent of those polled wanted the death penalty re-instated (D'Angelo, 2007). Furthermore, in 2008, 35 000 people voted on the issue during a television news broadcast. Of these, 98 per cent of South Africans voted in favour of re-instating capital punishment ("Should the death penalty", 2008). The divide in public consensus in the U.S. and S.A. demonstrates the ever-present controversial nature of capital punishment. The controversy is stirred further as in both countries public opinion statistically favours a sanction that may have been used in a racially discriminatory manner.

III.IV. Capital Punishment, Racial Discrimination, and the United States

In the U.S. racial discrimination can be seen in capital sentencing in various ways. For instance, the prosecutor may select defendants for the death penalty based on their race. This can be seen in its application in the past decade in the state of Georgia, for when the victim was white (as opposed to black) the likelihood of the prosecutor *requesting* capital punishment was doubled (see Tucker, 2007).

Moreover, there tends to be a higher rate of executions *occurring* for those who murder white individuals as opposed to situations when the victim is black. For example, a 2003 Amnesty International report noted that in the U.S. since 1977, 80 per cent of those who received the death penalty had murdered white individuals (Amnesty International, 2003). Furthermore, the fact that black individuals are executed disproportionately to the black population group, as opposed to white individuals to the white population group, may suggest an element of racial discrimination within capital sentencing (Blumstein, 1982; Gross & Mauro, 1989).

III.IV.I. The *Furman* Case: Arbitrary Distribution

In America, the landmark case of *Furman v. Georgia* (1972) dramatically reduced the mass use and misuse of the death penalty. In the U.S., the Fifth Amendment to the Constitution of the United States permits the deprivation of life for “capital ... crime[s]” (“Fifth Amendment”, 2009, para. 1). However, in this case the Supreme Court found, in a 5-4 *per curiam* decision, capital punishment to be unconstitutional because it violated the “cruel and unusual” clause in the Eighth Amendment to the Constitution of the United States by distributing capital sentences in an arbitrary manner (“Eighth Amendment”, 2009, para. 1; *Furman v. Georgia*, 1972, pp. 344-345).

Justice Marshall, along with Justice Brennan, considered capital punishment to be unconstitutional in virtually every respect, as he spoke of, for example, a negligent deterrent effect from the death penalty as well as potentially innocent individuals being executed (*Furman v. Georgia*, 1972, pp. 362-369). However, the two main issues focused on in this dissertation are retributivism and (racial) maldistribution. Justice Marshall dismissed the execution of murderers by equating retribution with mere revenge. He stated that:

Punishment for the sake of retribution [is] not permissible under the Eighth Amendment At times a cry is heard that morality requires vengeance to evidence society's abhorrence of the act. But the Eighth Amendment is our insulation from our baser selves. The 'cruel and unusual' [phrase] ... limits the avenues through which vengeance can be channelled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case. (*Furman v. Georgia*, 1972, pp. 344-345)

Although this dissertation does not agree with Justice Marshall's colloquial use of 'retribution' (see Chapter II), it does agree with his parallel opinion to Justice Stewart on the arbitrary distribution or (racial) maldistribution in capital sentencing. Justice Stewart noted that:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of ... murders[,] ... the perpetrators are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed [I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and [so Justice Stewart] put it to one side. [Justice Stewart concluded] that the Eighth and the Fourteenth Amendments cannot tolerate the inflicting of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed. (*Furman v. Georgia*, 1972, pp. 309-310)

III.IV.II. The *Gregg* Case: Public Opinion

After the ruling in *Furman v. Georgia* (1972) numerous states ended capital punishment while many others amended laws concerning it. For instance, the state of Georgia reduced the number of capital crimes (*Gregg v. Georgia*, 1976, pp. 162-168); reviewed all death sentences for emotional bias; and guaranteed that sentences were proportionate to other similar offences (*Gregg v. Georgia*, 1976, pp. 166-168). These revisions were believed to address the issue of the arbitrary sentencing or (racial) maldistribution as referred to in *Furman*, so as to constitutionally justify the use of the death penalty (*Gregg v. Georgia*, 1976, p. 195). This notion of removing maldistributed sentences to retain capital punishment is reflective of the disguised equal distribution response in Chapter VIII. That chapter will highlight the immorality of an arbitrary or racially maldistributed capital sentence as distinctly separate from the inherent morality or immorality of the death penalty.

In the *Gregg v. Georgia* (1976) case, public opinion was incorporated into the Court's decision concerning the death penalty. The Court stated that under the Eighth Amendment 'cruel and unusual' is reflective and reliant on the "evolving standards of decency that mark the progress of a maturing society" (*Gregg v. Georgia*, 1976, p. 173). In *Gregg v. Georgia* (1976), the Court decided that the death penalty did not violate these standards as the Fifth Amendment indicated that "the existence of capital punishment was accepted by the Framers" (p. 177), and since *Furman*, many states have re-instated capital punishment (pp. 179-187). The extent to which the public's voice can or should influence judicial authorities is interesting to note, as this is the theme of the implicit illegitimate authority argument in Chapter VI. That chapter will argue that judicial authorities must abide by the majority view of the public to maintain social order. If the majority of the public perceive capital sentencing to be arbitrarily or racially maldistributed, the public's discontent is enough to render the judicial authority as illegitimate, and thus the capital sentence to be an illegitimate punishment.

III.IV.III. The *McCleskey* Case: Racial Discrimination

The *McCleskey v. Kemp* (1987) case is considered vital regarding racial discrimination and sentence maldistribution in capital punishment. During a robbery Warren McCleskey, a black perpetrator, murdered a white police officer and was sentenced to death (*McCleskey v. Kemp*, 1987, p. 283). McCleskey's defence argued that the state of Georgia displayed systematic racial discrimination in capital sentencing and that this violated the Equal Protection Clause in the Fourteenth Amendment to the Constitution of the United States (*McCleskey v. Kemp*, 1987, p. 292). The Equal Protection Clause says that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws" ("Fourteenth Amendment", 2009, para. 1).

The defence utilised the famous 'Baldus study', which demonstrated that a black male who murders a white individual is 4.3 times more likely to be executed than a black male who murders a black individual (Baldus, Pulaski, & Woodworth, 1983). The Court acknowledged the validity of the study but advocated that the

sentence of death was not directly attributed to this defendant due to racial bias (*McCleskey v. Kemp*, 1987, pp. 286-299).

Moreover, Justice Brennan concurred that the capital sentence for McCleskey should stand because “recognition of McCleskey’s claim would open the door to widespread challenges to *all* aspects of criminal sentencing” (*McCleskey v. Kemp*, 1987, p. 339, see also pp. 315-318). It is interesting to note here that the length to which racial discrimination in capital sentencing can extend within the criminal justice system or even within the state is commented on in several sections of the explicit illegitimate authority argument in Chapter VII. That chapter seeks to determine the judicial authority in cases of capital punishment as illegitimate, and thus the sentence as illegitimate, as the authority exceeds his or her mandate of impartiality. Chapter VII questions the extent to which an illegitimate sentence can affect the legitimacy of the entire criminal justice system or beyond; the interplay between legitimating capital sentences and judicial discretion; and the role of unintentional, as opposed to intentional, racial bias in capital sentencing.

III.V. Capital Punishment, Racial Discrimination, and South Africa

As in the United States, racial discrimination also appeared in capital sentencing in South Africa (Hamilton et al., 2001; Kende, 2006; see also Bouckaert, 1996; Higginbotham, 1978; Jackson & Jackson, 1998; Johnson, 1985; Turrell, 2000, 2004). Unlike in South Africa, however, U.S. jurisprudence concerning the death penalty has taken a circuitous path to reach its current point, as opposed to the single *State v. Makwanyane* (1995) case. A brief historical overview of the death penalty in S.A. shall be mentioned.

In the 17th century, the Dutch Republic and its East India Company (DEIC) established a refreshment station for voyagers sailing between the DEIC’s main settlement at Batavia in Java and the Netherlands, under the command of Jan van Riebeeck, at the Cape of Good Hope in Table Bay (Fredrickson, 1981). This later developed into a settlement which necessitated the introduction of legislation, including the use of capital punishment for crimes such as murder and treason (Bouckaert, 1996, p. 288). The Union of South Africa which was part of the British Empire came into existence in 1910 (Thompson, 2006).

In 1948 the Afrikaner-dominated National Party (NP) became the governing political party following a whites-only general election. During the course of the following decades the National Party through legislation refined the concept of *apartheid*, meaning ‘separateness’, and imposed on South Africa policies pertaining to racial group classifications; homeland, educational, and medical segregation; and black-labour control (Fredrickson, 1981). In 1962 Parliament declared terrorism and sabotage to be capital crimes and, until 1990, capital punishment could be imposed for a wide range of violent and serious crimes, such as rape, kidnapping, and robbery with aggravating circumstances (Bouckaert, 1996, p. 291).

In 1963 former President of South Africa, Nelson Mandela, a leader of the African National Congress (ANC), a liberation movement, was charged with treason along with other defendants in the famous Rivonia Trial. It was anticipated that Mandela and his co-defendants would receive the death penalty from Justice Quartus de Wet (Mandela, 1995). They were successfully defended by Arthur Chaskalson who was assisted by Bram Fischer, George Bizos, and Joel Joffe, and given long prison sentences instead (Mandela, 1995, p. 159). Coincidentally, 30 years later, Chaskalson – who served between 1994 and 2001 as the first Judge President of the newly-established Constitutional Court – oversaw the abolition of capital punishment with the ruling in *State v. Makwanyane* (1995) (see Klug, 2003).

During the years of apartheid, capital punishment was used as a political device to hinder resistance (Bouckaert, 1996; Turrell, 2004). According to Holt (1989):

Capital punishment in South Africa has been ... a tool specifically for controlling and punishing opponents of apartheid. These motivations are particularly evident in the state’s treatment of accused members of banned liberation movements. In 1983, for instance, the execution of three convicted [ANC] combatants was [intentionally] timed to coincide with the seventh anniversary of [the 1976 Soweto] uprisings [as a reminder and warning to those who oppose the apartheid regime]. (p. 303)

Capital punishment was not only used as a means to curb political opposition to apartheid, in conjunction with other legislation such as the Prohibition of Mixed Marriages Act (1949) and the Group Areas Act (1950), but also, according to Turrell (2004), perpetuated apartheid’s main ideological conception of ‘white superiority’.

For instance, Bouckaert (1996) noted a 1988 Amnesty International study that indicated:

During a one-year period [in South Africa], [47] percent of the blacks convicted of murdering whites were sentenced to death, compared to no death sentences for whites convicted of murdering blacks and only two and a half percent for blacks convicted of killing blacks. One observer estimate[d] that between 1910 and 1975, [27] times as many blacks as whites were executed. (p. 293)

Bouckaert (1996) suggested that the apartheid regime's use of capital punishment in this manner furthered national and international protest against that government. For instance, member states of the British Commonwealth forced South Africa to withdraw as a member in 1961 due to racial policies, and in 1985, the governments of Great Britain and United States enforced certain economic sanctions because of the apartheid system (Robinson, n.d.). Racial discrimination played a large role in establishing new guidelines for judicial discretion and restricted the imposition of capital punishment from 1990. For instance, Section 277 of the Criminal Procedure Act (1977) was amended by Section 4 of the Criminal Law Amendment Act (1990), which altered the minimum age for execution from 16 to 18 years. Moreover, the last execution by the South African government took place in November 1989, so a *de facto* moratorium on executions was in place (*State v. Makwanyane*, 1995, p. 402, para. 6). Furthermore, bans on political opposition movements were lifted in 1990 (see Mandela, 1995).

The old Constitution of the Republic of South Africa of 1983 was amended to eliminate racially discriminatory clauses. Thus, the Interim Constitution of the Republic of South Africa of 1993 attempted to provide "a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex" (Postamble section). This led to the current Constitution of the Republic of South Africa of 1996, the result of considerable negotiation, input from members of the public and the deliberations of the Constitutional Assembly, which officially came into effect on 4 February, 1997.

III.V.I. The *Makwanyane* Case: Ending Capital Punishment

In *State v. Makwanyane* (1995) the Court considered the U.S. Supreme Court rulings in *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976). This case noted that the Fifth Amendment “impliedly recogni[s]es [the] validity” of capital punishment (Kronenwetter, 2001, p.270). However, unlike *Furman*, the South African Interim Constitution (1993) neither prohibited nor authorised state executions. So, in order to determine the South African death penalty’s constitutionality, the Court sought to determine whether Section 277(1)(a) of the Criminal Procedure Act (1977), which endorsed the validity of capital punishment for murderers, was compatible with the Interim Constitution (1993).

In *State v. Makwanyane* (1995), the Court stated that there was virtually no difference between the standard of guided discretion mentioned in *Gregg* and that which is described in Section 277 of the Criminal Procedure Act (1977). *Guided discretion* refers to statutory guidelines, such as the identification of mitigating and aggravating factors relevant to the determination of a sentence, which attempt to channel the discretion of sentencing authorities, in order to determine appropriate punishments, and remain consistent when allocating capital punishment. However, the South African Constitutional Court, unlike the U.S. Supreme Court, still considered guided discretion to be inadequate and unsatisfactory to justify the death penalty due to incongruent sentencing on racial and socio-economic status lines. Like *Furman*, the Court deemed that arbitrary death sentences were “cruel and inhumane” (*State v. Makwanyane*, 1995, p. 421, para. 55; see also Stevenson, 2002).

The Court deemed that arbitrary distribution, and racial maldistribution, of capital sentences violated the Interim Constitution (1993), where “no person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment” (s. 11(2)). Justice Chaskalson noted that:

Of the thousands of persons put on trial for murder, only a very small percentage are sentenced to death by a trial Court, and of those, a large number escape the ultimate penalty on appeal. At every stage of the process there is an element of chance. The outcome may be dependent upon factors such as the way the case is investigated by the police, the way the case is presented by the prosecutor, how effectively the accused is defended, the personality and particular

attitude to capital punishment of the trial Judge and, if the matter goes on appeal, the particular Judges who are selected to hear the case..... Race and class are [also] factors that run deep in our society and cannot simply be brushed aside as no longer being relevant [to capital sentencing]. (*State v. Makwanyane*, 1995, pp. 418-419, para. 48)

The South African Attorney General argued for capital punishment on the grounds of deterrence, prevention, and retribution. First, the Attorney General stated that the crime rate had radically increased since the moratorium on capital punishment, and concluded that the death penalty had been an effective deterrent (*State v. Makwanyane*, 1995, p. 442, para. 118). The Court, however, concluded that it would be “facile to attribute the increase in violent crime during this period to the moratorium on executions” (*State v. Makwanyane*, 1995, p. 443, para. 119).

Secondly, prevention was readily dismissed as the Constitutional Court deemed “imprisonment ... sufficient for the purpose of prevention in the overwhelming number of cases in which there are murder convictions ... [where] death sentences are imposed” (*State v. Makwanyane*, 1995, p. 445, para. 128). Thirdly, the Court deemed that S.A. had moved passed retribution (meant in the colloquial sense of revenge like Justice Marshall in *Furman*) (*State v. Makwanyane*, 1995, pp. 445-446, para. 129).

The Court considered all the arguments opposing or favouring capital punishment and contended that when “taken together ... capital punishment [is] cruel, inhuman and degrading” (*State v. Makwanyane*, 1995, p. 448, para. 135). So, in *State v. Makwanyane* (1995), the South African Constitutional Court ruled that capital punishment was unconstitutional (p. 453, para. 151).

III.VI. Concluding Capital Punishment and Racial Discrimination

In this chapter the issue of capital punishment and important American and South African case law was introduced. Also mentioned, was how arbitrary distribution, particularly due to racial maldistribution of capital sentences, relates to the history of death penalty jurisprudence in these countries. The major difference between these countries, however, is that the Constitution of the United States explicitly condones capital sentencing whereas the South African Constitution does not. As such, the U.S. Supreme Court decisions had to incorporate this

constitutionally protected value into their judgments, whereas the South African Constitutional Court had to decide whether or not capital sentences should be a constitutionally protected value.

The current unconstitutionality of the death penalty may change in South Africa's future. South African President Zacob Zuma, along with other leaders from this nation's most influential political parties, have spoken publically about a referendum to the South African Constitution to re-instate and use the death penalty (see Nduru, 2006; Nieuwoudt, 2008). If the South Africa Constitutional Court, in future, discusses re-instating capital punishment, van den Haag's view regarding the death penalty, among other considerations, should be presented. In the next chapter, theoretical retribution, capital punishment, arbitrary sentencing, and racial maldistribution (as described in Chapters II and III, respectively), are discussed together in order to state and clarify van den Haag's position.

CHAPTER IV

ERNEST VAN DEN HAAG'S POSITION

IV.I. The Importance of Being E(a)rnest

Ernest van den Haag (1914-2002) was a Dutch-American sociologist and professor of jurisprudence and public policy. Van den Haag spent most of his early years in Italy where he was nearly assassinated by Mussolini's regime for being a left-wing activist (M. E. Grenander Department of Special Collections and Archives [M. E. Grenander], 2005). In 1937 he was placed in solitary confinement, remaining there for close to two years (Nash, 2003). He later escaped from Italy to France which was then occupied by the Nazis.

In the 1940s he fled to America where he wrote hundreds of articles for the *National Review* and gave countless lectures and court testimonies to U.S. House and Senate subcommittees, the International Court of Justice, and the U.S. Supreme Court (see M. E. Grenander, 2005). He covered issues such as labour relations, Marxism, homosexuality, pornography, legalising drugs, philosophy, and legal and social theory. He also authored numerous books such as *Education as an Industry* (1956), *The Fabric of Society* (1957), *The Jewish Mystique* (1969), *Political Violence and Civil Disobedience* (1972), and *Punishing Criminals: Concerning a Very Old and Painful Question* (1975).

As expansive as his knowledge was, van den Haag was infamous for two issues, of which only the second will be discussed. First, in the 1960s he was in favour of racial segregation in schools, noting psychological damage integration may cause (see *Stell v. Savannah-Chatham County Board of Educ.*, 1963). Secondly – and the subject of this dissertation – he was a staunch defender of the use of capital punishment, regardless of the amount of arbitrary sentence distribution and racial bias (van den Haag, 1986; van den Haag & Conrad, 1983). Considering van den Haag's earlier leftist political viewpoint and constant encounters with extreme right-wing radicals in his youth, his unwavering stance in favour of the death penalty is somewhat ironic (see Gosse, 2005). It is, however, the thought involved or manner whereby he reaches his retentionist perspective, which is more intriguing.

IV.II. Van den Haag's Axiom

Van den Haag's notoriety is encapsulated by his perpetually stated axiom that one should always choose *unequal justice over equal injustice* (van den Haag, 1986; van den Haag & Conrad, 1983). He conceived that any rational society would always have a preference for employing a system of justice where deserved punishments are unequally distributed (i.e. *unequal justice*) as opposed to a system where deserved punishments are abolished in favour of an equal distribution (i.e. *equal injustice*) (van den Haag & Conrad, 1983).

In terms of the death penalty he asserted that rational individuals (see Chapter II) should always advocate for (first-degree) murderers to receive the death penalty even if only some of these murderers were eventually executed (i.e. *unequal justice*). Van den Haag maintained that this view was exceedingly more preferable to an abolitionist criminal justice system where not a single (first-degree) murderer received what he or she deserved, namely, capital punishment (i.e. *equal injustice*). Van den Haag propelled this axiom against abolitionists in numerous death penalty debates.

IV.II.I. Equal Distribution

For the retributivist van den Haag, the superlative notion of *equal justice* meant that justice was constantly distributed equally – that every guilty (first-degree) murderer deserving of the death penalty receives it in each capital case. However, van den Haag accepted that the unequal distribution of deserved punishments was realistically inescapable (see Black, 1974). He did, however, consider an unequal distribution of deserved punishments far more preferable than a criminal justice system completely void of a capital sentence which alternatively distributed deserved punishments for the crime of (first-degree) murder.

According to van den Haag, if one were to create an equal distribution by abolishing capital punishment, where no murderers received their just desert, their guilt and the need for justice remained unchanged (see Moore, 1997). If, in an unequal distribution, some murderers did not receive a capital sentence, “the guilt of the executed convicts would not be diminished, nor would their punishment be less deserved” (van den Haag & Conrad, 1983, p. 224). Hence, regardless of the

distributive form, the guilt and the need for offenders to receive their just desert does not alter.

As such, notions of desert and justice are more likely to be met with a distribution that is unequal (i.e. unequal justice), as opposed to non-existent (i.e. equal injustice), in a system that cannot guarantee every murderer receiving their just desert (i.e. equal justice). So, even though van den Haag does not reject the significance of equality for retributivism (see *Furman v. Georgia*, 1972, p. 247, where Justice Douglas quoted van den Haag), distributive and equality principles are secondary and less morally significant than the concept of justice. An intricate discussion of the links between justice and equality is beyond this dissertation, as van den Haag's challenge must be met on the basis of his retributive idea of justice (see Cohen, 2008; Dworkin, 1981; Kymlicka, 2002; Miller & Walzer, 1995; Nietzsche, 1878/1996; Rawls, 1971).

IV.II.II. Unequal Distribution

For van den Haag, an unequal distribution of capital sentencing is not all-inclusive and just in any circumstance. What could be termed *misdistribution* was the selection of *innocent* individuals for sentencing based on arbitrary biases. This was considered unjust by van den Haag. However, it is not the character of the punishment, being the death penalty, which automatically perpetuates injustice here. Rather, it was the punishment of the innocent that was intuitively and morally unjust, as they would receive a penalty which they did not deserve (van den Haag, 1986).

The unequal distribution of capital punishment, or *maldistribution*, refers only to those individuals *guilty* of their crimes, where the wrongdoers are unequally selected for the death penalty based on arbitrary biases. Some of the factors that can invoke bias in sentencing may include the gender, religion, nationality, culture, ethnicity, socio-economic status, or race of the defendant or victim. Van den Haag does not consider this to be unjust (van den Haag, 1986).

For van den Haag, and other like-minded retributivists, if the death penalty were immoral *in itself*, then there would be no distributive principle that could render it a moral act. Similarly, if capital punishment were a moral act *in itself*, even if punishment was indiscriminately imposed on wrongdoers by some game of chance,

this absurd and groundless distribution still does not render capital punishment immoral, nor make any individual punishment unjust (van den Haag, 1986). So, for van den Haag, “[m]aldistribution of any punishment among those who deserve it ... is irrelevant to its justice or morality” (van den Haag, 1986, p. 1663).

IV.II.III. Racial Maldistribution

The moral value of the death penalty is commonly questioned when the issue of racial discrimination arises in the maldistribution of capital sentencing. However, van den Haag gave little recognition or indulgence to increasing evidence of racially distributed death sentences (Reiman, 1985). For van den Haag, punishments were meted out to individuals, and not to specific racial groups. The only significant consideration was whether the executed individual deserved the punishment.

For van den Haag, if only white wrongdoers were given life imprisonment without the possibility of parole, and only black wrongdoers were executed, capital punishment would *still* be moral and just (van den Haag, 1986). As van den Haag states: “Discrimination must be abolished by abolishing discrimination – not by abolishing penalties” (van den Haag & Conrad, 1983, p. 223). So, if wrongdoers of a particular racial group endure capital sentencing more than those from another group, distribution simply needs to be equalised.

IV.III. Van den Haag’s Axiomatic Assumptions

Before arguments against van den Haag’s controversial position are raised, it is important to note three assumptions regarding his axiom. First, this dissertation seeks to challenge van den Haag’s axiom on his conservative or pure version of retribution which, he claimed, could not be done (see van den Haag, 1987). As such, the main pre-condition for this challenge is that consequentialist and hybrid reasoning is forbidden (see Alexander, 2002; McCloskey, 1965; Murphy, 1994; Pace, 2002).

Secondly, this work assumes, as did van den Haag, a traditional non-comparative approach to punishment and desert. The difference between the comparative and non-comparative approach is briefly described in the next chapter

but the detailed application of a comparative approach to punishment and desert is, however, beyond the scope of this dissertation. Thirdly, it is assumed that, in general, the punishment an offender deserves is proportional to the seriousness of the offence and the culpability of that offender (see Duff, 1996; Kelly, 2002; Rawls, 1971; Scheffler, 2000), and specifically, that capital punishment is deserved for (first-degree) murder.

As van den Haag's axiom and assumptions have been explained, arguments aimed at meeting van den Haag's challenge, and defining capital punishment as retributively immoral and unjust *in itself*, commences from the next chapter onward. Although it is only at this stage that counter-arguments against van den Haag can ensue, contextualising this dissertation by way of the previous chapters is necessary in order to follow the subsequent, mostly philosophical, counter-arguments.

CHAPTER V

THE INTERNAL INCONSISTENCY ARGUMENT

V.I. Introducing the Internal Inconsistency Argument

The core of van den Haag's axiom is retributivism's view on punishment. This is the view that individuals deserve to be proportionally punished for the wrongs they have committed, which even some liberals condone (Scheffler, 2000). The argument in this chapter attempts to demonstrate internal inconsistency when applying van den Haag's axiom to capital sentencing on retributive grounds. This chapter is a modification of an argument presented by Laufer and Hsieh (2003). It is argued that an adherence to unequal justice infringes upon a retributivist core principle: that the wrongdoer's punishment should be proportional to the wrongdoer's desert (see Chapter II).

V.II. Van den Haag's 'Parking Fine Analogy'

For the retributivist, it would be difficult to imagine a case when unequal justice is not always preferable to equal injustice. The person's moral culpability determines the punishment he or she should receive. Even if other equally deserving individuals are not punished, this should not reduce the culpability of the wrongdoer or the punishment that he or she should receive. As the argument is that it is better that some wrongdoers receive punishment as opposed to none (i.e. abolitionism), retributivism claims unequal justice is always preferable.

In defence of this van den Haag provided an analogy which has fewer emotive and political ties to capital punishment and racial discrimination. Van den Haag (1985a) mentioned a scenario where parking fines are *not* affixed to high-cost vehicles (i.e. expensive vehicles) whose drivers are guilty of parking violations, but *are* affixed to low-cost vehicles (i.e. inexpensive vehicles) whose drivers are guilty of the same criminal offence. The terms 'high-cost' and 'low-cost' in no way reflects hierarchy between or distinctive values of different racial groups in this dissertation.

Van den Haag asked two questions here and suggested a single negative answer for both (van den Haag, 1985a; see also Bedau, 1987). First, did the fact that

drivers of high-cost vehicles did not receive parking fines render the drivers of low-cost vehicles less guilty of their offences or less deserving of their parking fines? Secondly, and most importantly, would it be better to eliminate the punishment of parking fines for illegal acts of parking altogether?

V.III. The ‘Burden of Relative Disadvantage’ Response

Van den Haag was correct in stating that even though the drivers of high-cost vehicles were not punished for their offence the guilt of the low-cost vehicle drivers had not been diminished. However, van den Haag did not note that by punishing *only* the low-cost vehicle drivers he punished them *more* than they deserve (Laufer & Hsieh, 2003). This is because the high-cost vehicle drivers could use the money they would have to spend on the parking fines on other resources. So, the low-cost vehicle drivers suffer a greater inconvenience (i.e. the potential loss of resources or the inability to gain resources which could now be gained by the high-cost vehicle drivers) in addition to their fine.

The disadvantage is relative: not in the general sense that high-cost vehicle owners would often have a disproportionate financial advantage to gain resources than would the low-cost vehicle owners. Rather, the disadvantage is relative because that disproportional access to resources between the low- and high-cost vehicle owners would increase. This inconvenience may be deemed ‘costs’ (van den Haag, 1975), or the “burden of relative disadvantage” (or BORD) (Laufer & Hsieh, 2003, p. 348; for a general account of unfair advantage in punishment, see Gert, 1989; Murphy, 1990; Sher, 1987, 1997).

In retributivism, van den Haag’s notion of injustice, as explained in Chapter IV, is associated with the wrongdoers not receiving the punishment they deserve either at all or less than they deserve. Equally so, punishing wrongdoers *more* than they deserve is considered injustice (Christopher, 2002). This is often an appealing justification for the application of retributivism over consequentialism for punishment (Scheffler, 1994). Even van den Haag stated that retributivists “would not like to see wrongdoers get away with impunity ... [n]or would [retributivists] want people to suffer undeserved punishments, even if such injustice were somehow socially useful” (van den Haag & Conrad, 1983, p. 55). However, in van den Haag’s

own analogy, by not fining the drivers of high-cost vehicles, the drivers of low-cost vehicles were punished more than they deserved. The low-cost vehicles suffer the parking fine and the BORD for their parking violation. Thus, it must be with hesitation that one could claim a preference for unequal justice over equal injustice, as unequal justice seems to breach the internal structure of retributivism.

V.III.I. Expounding the ‘Burden of Relative Disadvantage’

Laufer and Hsieh (2003) expound the BORD in two ways. First, an approach of comparative punishment for desert is not adopted (see van den Haag’s second assumption in Chapter IV). In a *comparative* conception, the level of desert, and thus punishment, fluctuates in relation to whether others receive the same level of punishment when all are equally culpable (see Feinberg, 1970, 1973, 1974; Montague, 1980). In other words, the level of desert and punishment should decrease for low-cost vehicles’ drivers due to the high-cost vehicles’ drivers not receiving parking fines, because drivers of both types of vehicles committed the same offence.

In this dissertation’s version of the argument, however, a traditional *non-comparative* justice approach is adopted. This approach highlights the fact that it was the individuals’ culpability for the offence, and not their collective culpability, that indicated their level of desert and punishment. In other words, even though only low-cost vehicles’ drivers were fined while high-cost vehicles’ drivers guilty of the same offence were not, the level of desert and thus punishment did not decrease for the low-cost vehicles’ drivers. This is the same idea of retribution as seen in Chapter II.

The second point of clarification is the relationship between the BORD and the punishment. This dissertation does not assume that the BORD is always great in all circumstances of unequal justice. It does assume, however, that the BORD is positively correlated with the punishment (Laufer & Hsieh, 2003). So, in cases of unequal justice, if the punishment is not especially onerous, then the BORD is minor. In contrast, when the punishment is especially onerous, the BORD is significant. In this case, the wrongdoers who are punished are punished far *more* than they deserve, which violates one of van den Haag’s important retributivist principles.

V.III.II. First Objection to the ‘Burden of Relative Disadvantage’

There are two objections van den Haagians may raise to the BORD. The first is that, because individuals are punished more than they deserve, a circumstance where there is a BORD is, in fact, *not* a circumstance of unequal justice (Laufer & Hsieh, 2003). Van den Haagian unequal justice reflects a circumstance where some wrongdoers are punished and other wrongdoers are not. Also, the punishment inflicted on the wrongdoers is not more than they deserve and innocent individuals are not punished. Hence, as the BORD forces individuals to receive more than their just deserts, circumstances in which a BORD exists are not, in theory, those in which unequal justice is present.

In response to the first objection, one can even concede that unequal justice exists only in circumstances where there is a maldistribution of sentences, and no BORD. However, in order to avoid the first objection demonstrating fallacious circular logic, the BORD that is gained by the wrongdoer who was punished must be reduced to zero. As mentioned in the second clarification of the BORD, one must decrease the punishment incurred by the wrongdoer to decrease his or her BORD. However, once the punishment has been reduced enough to nullify the BORD, the wrongdoers now receive far *less* punishment than their individual moral desert indicates (Laufer & Hsieh, 2003). This violates one of van den Haag’s retributive principles. Thus, the first objection against the BORD response is unsuccessful.

V.III.III. Second Objection to the ‘Burden of Relative Disadvantage’

The second objection is that the BORD does not violate retributivist principles by punishing the wrongdoer more than he or she deserves, as the act of punishing drivers of low-cost vehicles is *distinct* from the act of not punishing drivers of high-cost vehicles (Laufer & Hsieh, 2003). Thus, there is no BORD because the advantage the high-cost vehicle owners attain is completely separate from the disadvantage the low-cost vehicles receive. An illustration, and explanation, of two scenarios is necessary to highlight this. The scenarios are described by Laufer and Hsieh (2003) as follows:

For the first scenario, the drivers of both low- and high-cost cost vehicles are fined for their parking violations. However, the low-cost vehicles’ drivers incur an

additional parking fine tax charge that the high-cost vehicles do not receive. In the case of the second scenario, the drivers of low- and high-cost vehicles are both fined for their parking violations. However, the high-cost vehicles' drivers all randomly win a prize in the town raffle worth the exact same amount as the parking fine, while all the low-cost vehicles' drivers by chance win nothing.

Thus in the first scenario the low-cost vehicles' drivers evidently endure more punishment than they deserve. These drivers are overtly given greater fines than the high-cost vehicle drivers. However, in the second scenario, the drivers of low-cost vehicles do not receive more punishment than what was deserved. They receive the exact punishment they deserve. The disadvantage that the low-cost vehicles have is completely separate from the high-cost vehicles' drivers winning the raffle thus cancelling out their parking fines (Laufer & Hsieh, 2003). Correspondingly, the BORD is not an overtly added punishment for the low-cost vehicles' drivers, but merely a separate gain for the high-cost vehicles' drivers. Thus, the BORD does not result in one group of wrongdoers being punished more than they deserve in cases of unequal justice.

There is a difference between the first and second scenario that can be accepted. In the second scenario, however, there is *also* a difference between the disadvantage the low-cost vehicles' drivers suffer and van den Haag's analogy. The second scenario is described accurately. The advantage the high-cost vehicles' drivers gained in winning a raffle to cancel out the parking fine is unrelated to the fact that low-cost vehicles' drivers did not win the raffle and had to pay the full fine. The aspect of 'raffle winning' is independent from parking fines. However, in van den Haag's analogy the advantage gained by the high-cost vehicle drivers by not having to pay a fine for the same violation committed by the low-cost vehicle drivers, who do have to pay fines, is directly connected and inseparable (Laufer & Hsieh, 2003). Thus, in cases where a BORD arises, the wrongdoers who are punished are in fact punished more than they deserve.

V.IV. Concluding the Internal Inconsistency Argument

This argument has been used to demonstrate that van den Haag's general presumption that unequal justice is always preferable to equal injustice, is

problematic due to the BORD. As stated in the second clarification of the BORD, the more severe the punishment in an unequal distribution of punishment the more severe is the BORD. Also, van den Haag and Conrad (1983) stated that “death must be the greatest of punishments” (p. 225) due to its finality (see *Capital Punishment*, 1972). Thus the BORD for those wrongdoers selected to receive capital punishment for arbitrary reasons, such as racial bias, should be astronomically high. These wrongdoers are punished far more than they deserve, enough even to warrant a complaint of equal injustice.

However, it is solely the death penalty that makes unusual use of the BORD. If only one murderer is executed while many other equally guilty offenders are not, there can be no added ‘cost’ or disadvantage to their punishment, simply because that offender has been executed (Laufer & Hsieh, 2003). (First-degree) murderers, then, receive their just deserts, no more and no less, even when the distribution is arbitrary or unequal. Therefore, although van den Haag seems incorrect in a general sense, the death penalty is unique enough to be the exception where unequal justice is preferable to equal injustice.

Nonetheless, the BORD response is useful in two ways. First, on retributivist grounds, one need not always favour unequal justice over equal injustice as van den Haag claims in respect of every punishment. Secondly, van den Haag’s ‘parking fine analogy’, highlights unequal justice by excluding the broader socio-historical context of inequality, prejudice and racism, and its effects on capital sentencing and the legitimacy of judicial authorities. The second argument against van den Haag, as presented in the next chapter, includes racial bias within capital sentencing and the effect it has on the public’s perception of the legitimacy of the judicial authority issuing maldistributed death sentences, questioning the legitimacy of those sentences.

CHAPTER VI

THE IMPLICIT ILLEGITIMATE AUTHORITY ARGUMENT

VI.I. Introducing the Implicit Illegitimate Authority Argument

The argument presented in this chapter takes a broader look at capital punishment on retributive grounds, the approach being from a commonly ignored area – whether the criminal justice system or authority imposing the punishment is legitimate. This chapter uses to some degree another argument proposed by Laufer and Hsieh (2003). Here the strength of van den Haag's axiom is investigated when perceptions of illegitimacy of the authority are rife due to systematic racial inequalities in capital sentencing.

VI.II. Public Perception, Legitimacy and Authority

The inference of this argument is that retributivism necessitates that the state be a legitimate authority in distributing punishment to wrongdoers (Laufer & Hsieh, 2003; Walker, 1991). The implication is drawn from the responsibility of the state to act as a surrogate to govern according to the people's will and to oversee a just distribution of punishment (Pollack, 1992). For van den Haag, and Kant, the state deals with civilians as ends in themselves by inflicting punishment on wrongdoers (Kant, 1797/1996; Walker, 1991; see also Sarat, 2002, for a discussion on the death penalty demonstrating sovereignty). Here, retributivism is "indispensable to the maintenance of any social order" (van den Haag, 1975, p. 12).

Predictably, negative encounters with the judicial process involved in capital sentencing have a tendency to produce highly negative assessments of a state's legitimacy (Laufer & Hsieh, 2003). The continued existence of a public institution or authority rests upon this perception of the state's legitimacy, as corroboration between the state and civilians is vital to establish and maintain legislative and social order (Jost & Major, 2001a; Lind & Tyler, 1988). For civilians, the desire to put faith in, abide by, and co-operate with legislative bodies, rests largely in their view of the legitimacy of the authority (Tyler & Darley, 2000).

According to Laufer and Hsieh (2003), a massive quantity of social psychology research demonstrates that there are two interconnected aspects that determine the public's perception of a legitimate authority (Tyler, 1990, 1997, 2001a; Tyler & Huo, 2002). First, the public must perceive the criminal justice system to implement fair procedures and sanctions. Secondly, the public must perceive the motivation for those procedures and sanctions to be impartial. Thus, the public's perception of legitimacy is based on a procedural and motivational impartiality from the authorities within the criminal justice system (see Folger, 1984).

The emphasis placed on impartial treatment is due to the public's understanding that all citizens have equal value in the society (Tyler, 2001b). Additionally, reviewers and commentators look for logical, impartial and constant decision-making when it comes to administering capital sentences (see Greenberg, 1982). Hence, the authorities that deliver capital sentences have the burden not only of giving a fair or proportional sentence to wrongdoers but of ensuring – and demonstrating – that the motivation or purpose behind the sentence appears unbiased to the public (Laufer & Hsieh, 2003). The latter is no small feat considering the past plethora of racial disparities and ideologies of superiority with eugenic and biological positivistic undertones (see Lombroso-Ferrero, 1972), and the suppression of civil and social equality in both the United States and South Africa (Fredrickson, 1981; also see Ogletree, 2002; Turrell, 2004).

Thus, the more unequal treatment administered in the course of criminal justice is, the greater the perception of illegitimacy of the authority (and the greater the need to justify the marginalisation and suffering of those discriminated against) (Olson & Hafer, 2001). So, when this authority delivers punishments where maldistribution of sentences is attributed to the acceptance of racial discrimination, the legitimacy of the authority begins to depreciate, as does the social order (Laufer & Hsieh, 2003).

VI.III. Public Perception and Racial Maldistribution

This dissertation does not dispute that there is often racial maldistribution in capital sentencing. There is a bulk of empirically verified research into racial

discrimination in capital sentencing in the United States, especially when the victim is white (see Baldus, 1998; Sorenson, Wallace, & Pilgrim, 2001). In the U.S. there have been duplicate outcomes in a range of jurisdictions such as Florida, North Carolina, Texas, South Carolina, and Georgia (see Baldus et al., 1983; Baldus, Woodworth, & Pulaski, 1990; Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 1998; Gross, 1985; Paternoster, 1983; Radelet & Vandiver, 1983; United States General Accounting Office [GAO], 1990; Zeisel, 1981). In South Africa, similar uses of the death penalty were noted (see Goldfarb, 1990; Turrell, 2004; van Niekerk, 1979).

Racial maldistribution in capital sentencing can be seen in several discriminatory modes in the U.S. Bienen (1996) has noted racial discrimination in the forms of stereotypical views of race by the jurors, the prosecutor, the judges, and in the aspirations of the political leaders who assign cases to these judicial authorities (see also Bright, 1994). Even in pre-abolitionist South Africa, Turrell (2004) and van Niekerk (1979) noted some similar modes of discrimination, such as racial stereotypes used by judges and prosecutors. The extent of racial disparity is not readily dismissible as negligent, particularly within the United States. For instance, one study reported that “[m]ore than two out of every three capital judgments reviewed by the courts during a 23-year period were found to be seriously flawed [with racial disparities]” (Liebman et al., 2000, p. 1).

Evidence of racial disparities resulting in a diminished faith in the criminal justice process is seen in the United States, and has been seen in South Africa, in the form of opinion polls, naturalistic observations, experimental studies, anecdotal evidence and / or surveys (see Barkan & Cohn, 1994; Bohm, 1990, 1991; Bohm, Clark, & Aveni, 1990, 1991; Bohm & Jamieson, 1995; Bohm & Vogel, 1991, 1994; Bohm, Vogel, & Maisto, 1993; Goldfarb, 1990; Hamilton et al., 2001; Sandys, 1995; Turrell, 2000, 2004; Tyler & Huo, 2002; van Niekerk, 1979; Wright, Lambert, & Clarke, 2001; Zimring, 2003).

In the U.S., where several states retain the death penalty, “minority group[s], such as black individuals, in contrast to being the majority racial group in South Africa,] ... feel that they are treated with bias and injustice” (Tyler & Huo, 2002, p. 141), particularly within capital sentencing (Sherman, 2002; see for examples,

Gallup & Newport, 1991; GAO, 1990). Kennedy (1988) notes that black individuals are “slighted by criminal justice systems that respond more forcefully to the killing of whites than the killing of blacks” (p. 1394; see also Baldus, Pulaski, & Woodworth, 1992). As such, “the perception of unequal treatment is the single most important source of popular dissatisfaction with the ... legal system” (Sarat, 1977, p. 434).

VI.IV. Public Perception and Unequal Justice

This argument posits that faith in the judiciary and the perception of its legitimacy are tied to van den Haag’s conception of unequal justice (Bilionis, 1993). Some theorists have noted that justice does not necessarily imply equality (Nozick, 1974). Others have gone as far as to state that equality is “an empty vessel with no substantive moral content of its own” (Westen, 1982, p. 547). Similarly, van den Haag questioned why the judiciary discerned equality as having a primary role over justice.

Van den Haag would suggest that even if “[e]veryone is equal before the law” (South African Constitution, 1996, p. 7, s. 9(1)) the underlying and more prominent message is “... justice for all” (“Pledge of Allegiance”, 2009) – for *justice* to be equally distributed. For van den Haag, “[j]ustice requires punishing the guilty – as many of the guilty as possible, even if actually only some can be punished” (van den Haag & Conrad, 1983, p. 224).

Although van den Haag stated that unequal justice can be repellent on moral grounds and “detrimental to the social fabric” (van den Haag & Conrad, 1983, p. 225) his explanation was different from this argument. Unequal justice is morally repellent not because *some* wrongdoers are chosen for their just deserts based on their race, but rather, because not *all* wrongdoers are chosen in spite of it (Laufer & Hsieh, 2003). Moreover, the social fabric is weakened because only *some* capital offenders receive the death penalty due to maldistribution, not that maldistribution due to racial discrimination corrodes the trust in and commitment to the authority of the state (Laufer & Hsieh, 2003).

Many scholars have debated the issue of fairness and equality (see Bassett, 2002). However, the present argument contends that van den Haag ignored the public's perception that the authorities that seem to dismiss racial bias in capital sentencing are illegitimate (Laufer & Hsieh, 2003). This cultivates the idea that inequalities within sentencing are tolerable, reasonable, and even just (Jost & Major, 2001b). Similarly, van den Haag did not recognise *any* amount of racial inequality to affect justice (see Chapter IV). So, by endorsing unequal justice in spite of palpable and verified proof of racial discrimination in capital sentencing, he played a role in defending, justifying and validating inequalities in sentencing.

This is an awkward position for the retributivist as retributive theory is meant to surpass racial inequalities to ensure those deserving receive their punishment. To explicate, racial maldistribution in capital sentencing had unseemly outcomes for van den Haag in different hypothetical cases. For instance, if the lives of black murderers were valued equivalently to those of white murderers in capital sentencing (with all else constant), there might be fewer murderers receiving their just deserts (Laufer & Hsieh, 2003). Furthermore, if the lives of white murderers were valued equivalently to black murderers in capital sentencing (with all else constant), there may be numerous murderers receiving their just deserts (Laufer & Hsieh, 2003). Therefore, the real impact on justice of racism in capital sentencing seems ignored or acceptable for retributivists even when its effects on retributive principles are considered.

VI.V. Public Perception and Equal Injustice

The argument has so far focused on unequal justice and the perception of legitimacy. However, the van den Haagian *equal injustice* will also be added. Van den Haag described equal injustice as the abolition of the death penalty and an illogical substitute for unequal justice (see Chapter IV). Nonetheless, equal injustice would most likely be observed in a different manner by racial groups whose past is flooded with false arrests, politically motivated prosecutions and capital sanctions – whether one speaks of apartheid in South Africa, or the Southern United States' extrajudicial lynching, peaking between the end of the nineteenth century and the beginning of the twentieth (Cutler, 1969; also see White, 1929).

Pure retributivists may not consider the significance of abolishing capital punishment for individual members of previously subjugated and exploited groups (Goldberg, 2002). Although van den Haag's idea of justice as being as equal as possible had merit, he ignored the fact that the amount of racial inequality and the public's perception of the authorities' illegitimacy reached beyond his conception (Entman & Rojecki, 2000; Kluegel & Smith, 1986; Mills, 1998). What is required of van den Haag's followers is to admit that racial discrimination corrodes the perceived legitimacy of the criminal justice system, which challenges the legitimacy of that institution and capital punishment. Racial discrimination in van den Haag's assertion for unequal justice then cannot always be considered morally irrelevant.

VI.VI. Concluding the Implicit Illegitimate Authority Argument

It may be so that "no human system of punishment can avoid the possibility of punishing the innocent and punishing the guilty more than they deserve" (Alexander, 2002, p. 819). Even van den Haag admitted that flaws in the criminal process ended up punishing an "unavoidably capricious ... [and] ... random, selection of the guilty" (van den Haag & Conrad, 1983, p. 224). However, the evidence for racial disparity is concise and far less vague. As there is much empirical evidence demonstrating racial discrimination in the criminal justice system, there is an inference as to which races deserve capital punishment from a retributive viewpoint (Laufer & Hsieh, 2003).

This is problematic for van den Haag who deemed race to be unimportant and ineffectual in determining desert and allocating punishment. Although pure retributivists claim that the "judicial system ... deserves and gains the trust of the community by effectively protecting its order and satisfying its sense of justice" (van den Haag, 1975, p. 13), neither the social order nor the feeling of judicial repute are present for these disparate groups. The view of those retributivists who say that "[i]t is important for laws and courts not only to be just but also appear just" (van den Haag & Conrad, 1983, p. 230) needs to be questioned.

It could well be argued that although this proposition has merit it is structurally weak. First, *inferring* that retributivism accepts racism is not a sound counter-argument against unequal justice. Instead it simply reinforces the

controversial nature of van den Haag's position, his notion of individual moral desert, and the initial motivation for challenging his axiom in this dissertation. Secondly, it is understandable that racial maldistribution in capital sentencing has a high likelihood of instilling a negative perception of the authority involved. There is, however, only a tentative connection between the public's perception of the authority's illegitimacy and its *actual* illegitimacy, and thus, the legitimacy of the punishment for capital crimes. Also, although public perception may indicate whether there will be social order, there is no *causal* link to suggest that if this social order cannot be maintained, that it is only because the authority and capital punishment sentences are illegitimate. The most appropriate counter to van den Haag's axiom is to *explicitly* determine the authority as illegitimate. The third argument against van den Haag, in the next chapter, attempts this, but first establishes a stronger philosophical association between a legitimate authority and the legitimacy of the punishment which is imposed.

CHAPTER VII

THE EXPLICIT ILLEGITIMATE AUTHORITY ARGUMENT

VII.I. Introducing the Explicit Illegitimate Authority Argument

Van den Haag does not seem to acknowledge the ‘right’ involved in fulfilling moral desert claims or punishing the wrongdoer (van den Haag, 1986). There is an association between those who deserve punishment and those with the right or legitimate authority to punish (for a philosophical debate on legitimate authority, see Bates, 1972; Edmundson, 1998; Krehoff, 2008; Ladenson, 1972a, 1972b; Nowell-Smith, 1976; Westphal, 1992). This chapter, based on an argument presented by McDermott (2001), philosophically extrapolates this association, in order to determine whether or not the authority is legitimate and thus whether or not the punishment that authority decrees is legitimate. If any punishment is provided by an illegitimate authority, that punishment is reduced to harm, thereby promoting further injustice. Here *harm* is equated with a punishment that has no moral or retributive justification – punishment that is illegitimate.

VII.II. Nathanson’s ‘Bearded Speeder Analogy’

Stephen Nathanson (1985) argues that the key mistake in van den Haag’s reasoning concerning racial maldistribution in capital sentencing for wrongdoers is the underlying motivation for the punishment. Nathanson (1985) expressed a simpler analogy to van den Haag (seen in Chapter V) to demonstrate this: A traffic officer on a highway is meant to fine all speeders. However, the traffic officer only fines those speeders who have beards. In this unequal distribution of sentences, are the bearded individuals treated unjustly even though they are speeders?

Nathanson (1985) would suggest that the bearded speeders *were* treated unjustly because the purpose of the punishment was not clearly related to the offence. The presence of a beard was the primary motivation for fining, and speeding a secondary motive (Nathanson, 1985). Thus, even though the bearded speeders deserved the punishment they received, the distribution of that punishment was unjust because justice was a secondary concern.

While Nathanson's analogy has merit, it is unable, however, to argue effectively against van den Haag's position. Van den Haag would simply assert individual just desert (McDermott, 2001). As the bearded speeders broke the law they deserve to be punished accordingly, even if the traffic officer was biased and this reflected poorly on the traffic department (van den Haag, 1985b). For van den Haag, the only injustice is that the non-bearded speeders did not receive speeding fines. The arbitrary decision of the traffic officer does not alter the wrongness of the bearded speeders' actions or their deserved punishment.

VII.III. Just Desert and Legitimate Authority

It is not, then, the motivation that seems to underlie the association between the legitimacy of the authority and the legitimacy of the punishment as Nathanson suggests, but rather, according to Jeffrie Murphy (1969), three provisos must be met to deem the punishment as legitimate and not mere harm. There must be "a system of rules, authorities to apply these rules, and authorities to enforce sanctions for breaches of these rules" (p. 261; see also Benn & Peters, 1959; Flew, 1954; Hart, 1968b). In Nathanson's analogy, there is a criminal justice system with rules or laws pertaining to speeding and the traffic officer is a state designated authority to apply these speeding laws. Thus provisos one and two are met. However, it can be argued that the third proviso was not met as the traffic officer who traditionally has the authority to fine individuals who speed lost that authority on account of his prejudice against bearded speeders (McDermott, 2001). If this is so, the fines given were harm, not punishment, and thus in violation of van den Haagian retributive justice.

VII.III.I. Do All Desert Claims Need a Legitimate Authority?

A strong philosophical association between the legitimacy of the authority and the legitimacy of the punishment in order to fulfil moral desert claims it is vital for this argument. As such, this dissertation will return to the above argument at a later stage once this issue has been dealt with. The desert claim used by McDermott (2001) and in this dissertation is: 'X deserves punishment *P*'. It is argued that only a legitimate authority must inflict punishment *P* on *X*. Hence, retributivists should not, in every instance, be content when wrongdoers receive punishment – but only in

situations where the authority has the right to punish. However, one must question whether desert claims even need a legitimate authority to execute them.

There are desert claims that do not require an exceptional source or authority to execute them. Examples of these, for instance, are desert claims such as: ‘Steve Biko *deserves* acclaim for his involvement in the struggle against apartheid’, and, ‘the Nelson Mandela statue in Nelson Mandela Square *deserves* respect’. These, however, are not desert claims of justice. It is not credible to state that it would be morally unjust if these acts were not to occur (McDermott, 2001). A situation dissimilar to this occurs – and is considered unjust on the grounds of retributive theory – when *X* does not receive punishment *P*, which he or she deserves. Thus, the previously mentioned desert claims are for purposes other than justice.

VII.III.II. Do All Desert Claims of Justice Need a Legitimate Authority?

There are, however, also desert claims of justice which do not necessitate a specific authority. For instance, the desert claim that ‘everyone *deserves* to be respected’ is a claim of justice. The reason for this is that it is credible to state (even though the assertion is a weak one) that respect is deserved from a particular source or authority (i.e. everyone else) and thus the absence of this conduct (or disrespect for others) is morally unjust (McDermott, 2001).

In a stronger sense, Section 10 of The Bill of Rights, which is contained in the South African Constitution, states: “Everyone [*deserves* or] has ... the right to have their dignity respected” (1996, p. 7, s.10), and in Section 8(1), “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state” (1996, p. 6, s. 8). Here, it is highly credible to offer this as a claim of justice, as the source or authority to fulfil this desert claim is clearly specified, and thus the absence of this conduct is both morally and legally unjust.

However, in respect of the claim that ‘everyone *deserves* to be respected’ the authority involved in fulfilling it is everyone, in effect, there ceases to be a *specific* authority to deliver that respect (McDermott, 2001). The second case has the same result. Although Section 8(1) of the South African Constitution (1996) states the specific authority that must provide the respect (i.e. not everyone in the society is a legitimate authority), providing that respect is not limited to that authority (i.e.

everyone in the society can also fulfil the desert claim). Thus, in both the weaker and stronger sense, there are desert claims of justice which do not necessitate a *specific* authority, with only that authority having the 'right' to fulfil desert claims.

VII.III.III. The Uniqueness of a Desert Claim of Just Punishment

Desert claims of just punishment are distinct from the desert claims mentioned above due to the kind of deserved conduct (McDermott, 2001). For instance, acclaim, respect and dignity, can be provided at any time by any person or institution with virtually no fluctuation in meaning, regardless of the circumstances of the delivery. However, punishment can only be a punishment (or a penalty) and not an affliction of pure harm in *particular* circumstances.

As an example, to end the life of another can be punishment, as in the death penalty, or harm, as when an individual murders a man to obtain his vehicle. To distinguish between the two meanings one views the 'right' given to the *person(s) or institution(s)* committing the act in the different circumstances (McDermott, 2001). The person or institution must have the specific 'right' to punish in particular circumstances in order to be a specific *legitimate authority*, so that the affliction is distinguishably punishment (and just) as opposed to harm (and unjust).

Therefore, the desert claim 'X deserves punishment *P*' has an internal clause, the term 'punishment' (McDermott, 2001). This claim necessitates a specific legitimate authority so that the desert claim 'X deserves harm *H*' is not fulfilled, and for the desert claim of just punishment to be executed. In denying this, morally just punishments would amount to *any* person(s) or institution(s) injuring another in retaliation for any harm suffered in *any* circumstance.

VII.III.IV. A Lockean Interjection

Is it tantamount to insanity to suggest that any person or institution has the right to punish in any circumstance? According to McDermott (2001), one may revisit John Locke in order to answer that. Locke was a pioneer in contemporary political philosophy, particularly social contract theory (as discussed in Chapter II). His influence can be seen in the United States' Declaration of Independence (Becker,

1922) and in the writings of philosophers, such as Rousseau (1712-1778), Hume (1711-1776), and Kant (1724-1804).

Locke argued that in the ‘state of nature’, the original state of being, every individual possesses a natural and equal ‘right’ to inflict punishment (Locke, 1690/1988). Thus, the desert claim ‘*X* deserves punishment *P*’ could be morally and justly executed by anyone in any circumstance. However, once those in the ‘state of nature’ cross over the threshold into civil society the individual ‘right’ to punish is ceded to an authority (Locke, 1690/1988). The authority, given the ‘right’ or legitimacy to punish in particular circumstances, was agreed upon and designed for the benefit of all while under the ‘veil of ignorance’ (Kymlicka, 2002). Hence, the desert claim that ‘*X* deserves punishment *P*’ could not be executed by anyone, for *only* the legitimate authority in particular circumstances may inflict pain on another for it to be a just punishment, and not merely unjust harm.

VII.IV. Illegitimate Authority: A Return to Nathanson

Thus far, it is clear that for a punishment to be just on retributive grounds the authority must be legitimate. If the authority is not legitimate, the moral desert claim is not executed as the penalty inflicted on the wrongdoer counts as mere harm. Van den Haag is correct that the maldistribution of punishment does not impinge on individual desert (Chapter IV). However, the legitimacy of the authority does indeed. As stated before in the context of Murphy’s (1969) three provisos, the traffic officer is generally considered a legitimate authority. However, in Nathanson’s analogy, the officer superseded his own authority, thereby becoming an illegitimate authority, and thus his subsequent punishment illegitimate and unjust (McDermott, 2001).

To explain, this traffic officer happened to choose individuals with beards for special treatment. He could have chosen the infirm, the elderly, or individuals who are white, coloured, black, and so on. The point is the same. The traffic officer’s personal bias altered his behaviour and overwhelmingly dishonoured his directive of impartiality to administer fines. With this behaviour in that particular circumstance he exceeded his mandate and negated the reason for his having that position of authority. Without a doubt the bearded speeders do deserve punishment but not by *that* authority. Because the traffic officer fined only bearded speeders, the fines he

levied fell into the category of unjust harm. As a result the wrongdoer does not have his or her desert claims fulfilled or receive the punishment he or she deserves – and in addition endures unjustified harm from the illegitimate authority (McDermott, 2001). This demonstrates that in the case of an arbitrary distribution of punishment, unequal justice, as opposed to the alternative in van den Haag's axiom, promotes more retributive injustice.

VII.IV.I. The Illegitimacy of the Capital Sentencing Authority

The outcome of Nathanson's analogy will be applied to racial maldistribution in capital sentencing. According to the desert claim of just punishment, a judicial authority, such as a judge or a set of jurors, can inflict just punishment only when that judicial authority has the 'right' to punish in particular circumstances – or is acting legitimately. However, instead of compiling a list of legitimate actions, one could generate a list of illegitimate ones (McDermott, 2001). Illegitimate acts are considered actions that are in direct violation to that authority's mandate. From a democratic viewpoint, chosen as it aligns with Kant's (1797/1996) conception of an ideal state and legitimate authority to dispense punishment, the authority's mandate may be included in the Constitution of the authority's jurisdiction – as liberalist principles are currently commonly included in state legislation (McDermott, 2001).

For example, Section 9(3) of the South African Constitution (1996), notes that “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour[, and so on]” (p.7). So, if the juridical authority exercised racial bias in capital decisions – which counters constitutional and liberal egalitarian principles – the legitimacy of the authority is exceeded, making the authority and thus the authority's sentence illegitimate. However, as the judicial authority is a representative of the state, does the state become illegitimate if its representative is deemed illegitimate?

VII.IV.II. The Boundaries of Illegitimacy

The conceptual connection between legitimate authorities and the execution of moral desert claims has been established above. However, the practical

consideration of the parameter for illegitimacy is problematic. In other words, to what extent do illegitimate acts affect an otherwise legitimate institution? One can take a Gestalt-like view in which any illegitimate authority, exercising a then illegitimate sanction, could result in the whole criminal justice system or state government becoming illegitimate. For instance, if the ‘Baldus study’ is correct in demonstrating racial bias and maldistribution in death penalty sentencing, this means the criminal justice system in the State of Georgia, or even the whole U.S. government could be illegitimate.

However, if one illegitimate practice or part thereof made the whole criminal justice system or government illegitimate there may be no governments *at all* that can be considered morally legitimate to distribute just punishments (McDermott, 2001). So, if a particular practice were illegitimate, such as capital sentencing due to racial bias – and the illegitimacy could not be removed – the practice itself should then be removed (i.e. equal injustice). This is echoed by abolitionist Charles Black (1974) who maintains that racial bias, as part of judicial discretion, would never escape the process of capital sentencing. Hence, if the authority is illegitimate due to racial discrimination in capital sentencing, the punishment of state sanctioned execution can never be morally just, and so should be abolished.

VII.IV.III. Legitimacy by Removing Judicial Discretion

A retributivist may desire to remove judicial discretion from capital sentencing, eliminating bias, making the authority legitimate and the punishment just, in that they fulfil the wrongdoer’s moral desert claim (McDermott, 2001). It is, however, unlikely for any court to find this acceptable. For instance, after *Furman* (Chapter III), the U.S. Supreme Court in *Woodson v. North Carolina* (1976) ruled against this motion (see also *Roberts v. Louisiana*, 1976). Justice Stewart said that the Eighth Amendment “requires consideration of the character and record of the individual offender and the circumstances of the particular offence as a constitutionally indispensable part of the process of inflicting the penalty of death” (*Woodson v. North Carolina*, 1976, p. 304).

Theoretically, a retributivist should consider the circumstances surrounding the wrongdoer’s offence to determine a more accurate level of desert and administer

a more accurate and, therefore, just punishment (McDermott, 2001). As Jeffrie Murphy stated:

To avoid inflicting upon persons more suffering than they deserve, or to avoid punishing the less responsible, is a simple – indeed obvious – demand of justice. Basic demands of justice are that like cases [are] treated alike, that morally relevant differences between persons be noticed, and that our treatment of those persons be affected by those differences. This demand for individuation – a tailoring of our retributive response to the individual natures of the persons with whom we are dealing – is a part of what we mean by taking persons seriously as persons [as ends in themselves] and thus is a basic demand of justice. (Murphy & Hampton, 1988, p. 171)

VII.IV.IV. Unintentional Racial Discrimination

Claimed thus far, when racial maldistribution occurs in capital sentencing the authority becomes illegitimate, as does the practice. So, the death penalty should be abolished (i.e. equal injustice) when there is an arbitrary or racial maldistribution, particularly because there is no significant retributive reason to remove judicial discretion. There is, however, a distinction between intentional and unintentional racial discrimination (McDermott, 2001). In Nathanson's 'bearded speeder analogy', the action to fine bearded speeders only was *intentional*, which exceeded the boundaries of his or her authority. This intention is inevitably what made the punishment illegitimate.

What of unintentional racial discrimination? For instance, in the *McCleskey* case (Chapter III), Justice Powell mentioned that although the 'Baldus study' demonstrated general racial discrimination in capital sentencing in the Georgia criminal justice system, the study did not indicate that McCleskey was intentionally targeted. As a result, the Court rejected his appeal against his capital sentence.

Nonetheless, if certain judicial practices are discriminatory against a group of individuals, whether it is race-based, gender-based, and the like, and not necessarily targeting a specific individual, then that authority is illegitimate and the punishment unjust (McDermott, 2001). Similar reasoning was seen in *Furman* (Chapter III), where systematic abuses of death penalty jurisprudence, and not necessarily targeted malice, rendered the death penalty in Georgia 'cruel and unusual' (1972, p. 309; see also *Caldwell v. Mississippi*, 1985; *Godfrey v. Georgia*, 1980).

It is philosophically nonsensical to claim that when an authority is biased toward some members of the society and not toward others, that it is illegitimate at times and legitimate at other times (McDermott, 2001). One has only to use the apartheid government as an example of this. Was it illegitimate when overseeing non-white individuals and legitimate when overseeing white individuals? One of the main goals of a liberal government is “the achievement of equality”, particularly that of “[n]on-racialism” (South African Constitution, 1996, p. 3). Therefore, if the authority generally practices illegitimate acts within a kind of criminal sentencing, such as racial discrimination in capital sentencing, the authority is *in toto* illegitimate. The authority does not rotate between legitimacy and illegitimacy depending on the individuals being sentenced at the time. Thus, even when there are occasions when the authority does not appear to be discriminatory and there is general racial bias in the capital sentencing system, the authority remains illegitimate and the capital punishment becomes unjust.

VII.V. Concluding the Explicit Illegitimate Authority Argument

If the death penalty is not eliminated (i.e. equal injustice) the retributivist should be wary of a problem in addition to the wrongdoers not receiving their just deserts. In applying racial discrimination in capital sentencing, the judicial authority has violated its mandate, transforming the punishment into unjust harm because the authority has become illegitimate. This not only counter-acts the aim of retribution, but doubles the injustice. The desert claim of just punishment as applied to the wrongdoer is not fulfilled and an additional act of unjust harm is made against the offender. This violates two aspects of van den Haag’s retributivism. The offender does not receive the punishment he or she deserves, and the offender is harmed without any moral justification. Van den Haag rejects abolitionism or life imprisonment on the grounds that the punishment the wrongdoers receive is *less* than they deserve (van den Haag, 1986). However, if the aim of van den Haag’s retributivism is to produce as much justice as possible by accurately meeting desert with punishment, he should, in cases with racially maldistributed capital sentences, have supported abolitionism (i.e. equal injustice).

CHAPTER VIII

THE DISGUISED EQUAL DISTRIBUTION RESPONSE

VIII.I. Introducing the Disguised Equal Distribution Response

The argument put forward in Chapter VII is that on pure retributivist grounds a punishment is just only when the authority administering the punishment is legitimate. However, racial discrimination within capital sentencing makes the authority illegitimate, as the authority oversteps its mandate of impartiality. So, the death penalty becomes an illegitimate practice, exerting only harm and not just punishment, regardless of the wrongdoer's guilt. This creates further injustice, inhibiting the goal of retributivism, whereby the illegitimate practice should be abolished. However, this chapter, partly based on an argument presented by Brooks (2004), suggests that the above argument is not a valid argument against the morality of the death penalty *per se*, merely the illusion of one. The explicit illegitimate authority argument is, in fact, an argument against the innate immorality of maldistribution – or rather, highlights the inherent morality of *equalising distribution*. This is explained in the subsequent sections of this chapter.

VIII.II. Disguised Equal Distribution with Capital Maldistribution

Nathanson's analogy as outlined in Chapter VII is worthy of re-examination. Brooks (2004) notes a scenario where the traffic officer in Nathanson's analogy was replaced by Traffic Officer B. Traffic Officer B fines all speeders, although a group of drivers who are regular offenders (such as sports car drivers) nonetheless emerge. On retributive grounds, all those deserving of punishment should have received it, regardless of whether a specific group of wrongdoers emerged afterward. Therefore the elimination of the imposition of speeding fines altogether would be unnecessary if the distribution were simply improved.

Correspondingly, this means that if there were no racial maldistribution in capital sentencing there would be no reason to denote the practice as illegitimate and eliminate it (Brooks, 2004). For example, if during apartheid black and white murderers were equally sentenced and executed, there would be no reason to abolish

the death penalty, and the argument in Chapter VII would be revealed as an argument for the improved distribution of capital sentencing. As mentioned in Chapter V, van den Haag argued that no change in the distribution of a sentence could make an innately immoral sentence an innately moral one, and vice versa. As seen in *Gregg v. Georgia* (1976), as opposed to *State v. Makwanyane* (1995) (Chapter III), if capital punishment distribution is rectified by removing bias, there is no reason to abolish the death penalty.

VIII.III. Disguised Equal Distribution with Mass Sanction Maldistribution

The argument presented in Chapter VII assumed that capital punishment is the *only* judicial punishment that is illegitimate due to racial bias. It is difficult, however, to imagine why, if racial discrimination exists in capital sentencing, it would not exist in other penal sanctions as well (Brooks, 2004). This chapter does not argue that one illegitimate practice infects the whole, but rather, if all (or most) punishments in the criminal justice system (including capital punishment) are maldistributed due to racism – following the previous chapter’s logic – all or most penalties imposed by the criminal justice system should be eliminated because the authority imposing them is illegitimate.

Brooks (2004) suggests that there are two plausible responses that abolitionists may use. First, those purporting equal injustice may agree and recommend the dismantling of the entire criminal justice system, or even the state or country’s entire government. Secondly, others may be reluctant to dismantle the entire criminal justice system, but still recognise the singularity of the death penalty, and so desire to eliminate only that practice. Both perspectives will be discussed, beginning with the former view.

VIII.III.I. Abolish the Entire Maldistributed System

For those abolitionists who accept that in the event of all or most penalties being maldistributed the entire criminal justice system should be abolished, the equal distribution response still stands (Brooks, 2004). Some abolitionists suggest that “[i]f it is the case that the entire system is corrupted by racial discrimination, then it is an illegitimate system, and therefore bringing it to a halt might not be such a bad [idea]”

(McDermott, 2001, p. 330). Although in most countries this would be complicated and laborious, it is a path that has been taken by some countries, South Africa being one such example. Following the demise of apartheid, the government, the Constitution and the criminal justice system changed dramatically to the country's great benefit, particularly with regards to advocating non-racism.

However, although in South Africa the criminal justice system was reformed, a new government elected, and a Constitution acknowledged as "the most admirable constitution in the history of the world" (Sunstein, 2001, p. 261) introduced, abolishing the entire maldistributed system was not done. The system was merely revamped to reduce elements of racial bias. Certain laws that were blatantly racist such as the Pass Laws Act (1952) and the Bantu Education Act (1953) were abrogated, while many other laws meant to be equally applicable to all citizens, which may still be maldistributed, were not. If it is the maldistribution of the punishment that is the problem then it is the distribution *itself* that needs to be reformed, revamped, or improved.

VIII.III.II. Abolish Only the Death Penalty in the Maldistributed System

There are abolitionists who would not advocate the dismantling of the entire criminal justice system, but still consider the death penalty the only practice worthy of elimination in a sea of penal sanction maldistribution. Nathanson (1985) commented that:

To do away with punishment entirely would be to do away with the criminal law and the system of constraints which it supports ... if we abolish capital punishment, there is reason to believe that nothing [dangerous] will happen. (p. 162)

The argument is, then, that punishment in general must be maintained in order to ensure that individuals will generally behave lawfully, even if sentences are maldistributed. The death penalty, however, must be eliminated because of its maldistribution. The reason for treating capital punishment differently, Nathanson (1985) claimed, is that the removal of the death penalty is "unnecessary for protecting citizens" as "the results of abolishing punishment generally would be disastrous, while the results of abolishing capital punishment are likely to be insignificant" (p. 162).

However, this sounds more like consequentialism than retributivism (see Chapter II). If the general judicial system is maldistributing sentences, this is justifiable if it has a significant enough deterrent effect. Pure retributivists are not interested in individual or general deterrent effects on potential wrongdoers, but rather, whether the desert claim of just punishment can be fulfilled (Brooks, 2004). “[T]he death of the murderer is justified not by its effects on other potential murderers, but by the murderer’s own moral guilt” (Reiman, 1983, p. 36; see also Primoratz, 1999).

If the use of hybrid theories of retributivism and consequentialism, which are not completely void of value (van den Haag, 1985b; van den Haag, 1986), were permitted in this dissertation to justify abolitionism due to racial maldistribution, what Nathanson postulated may stand untouched. However, the inclusion of consequentialist or hybrid arguments cannot be used here if van den Haag’s challenge is to be met.

VIII.IV. Concluding the Disguised Equal Distribution Response

Racial maldistribution in capital sentencing results in a breach of the judicial authority’s mandate and thus its illegitimacy, which renders the death penalty unjust. Thus, abolitionism (i.e. equal injustice) seems preferable to a maldistributed capital punishment system (i.e. unequal justice). However, the response in this chapter indicates that, on retributive grounds, capital punishment is also morally just when the distribution is unbiased. How can the inherent morality of capital punishment change? For van den Haag, “improper distribution cannot affect the quality of what is distributed” (Stairs, n.d., para. 2). What is, in fact, addressed, is the inherent morality of the distribution of the penalty. The explicit illegitimate authority argument is not an argument to be used against van den Haag for the abolition of capital punishment due to inherent injustice, but is an argument against any biased distribution of any penalties in any criminal justice system (Brooks, 2004).

There is, in light of this view, little reason to suspect that the death penalty is the only penal sanction that is racially maldistributed and immoral *in itself*. One can eliminate most or all penal sanctions for the same reasons of illegitimacy and unjust harm. This would be detrimental on retributive grounds. There would be an

overabundance of injustice as there would be no agreeable mandate or legitimate authority to administer just punishment and contain inevitable chaos and vigilante behaviour (Brooks, 2004).

Alternatively, one could eliminate capital punishment due to racial maldistribution and retain all other sanctions because abolishing the death penalty would have only a minor effect on the citizens' adherence to the law. This is, however, a consequentialist, or at the very least a hybrid, justification for the elimination of the death penalty. This is, of course, not permitted as an argument against van den Haag. If the criminal justice system and sanctions other than capital sentencing should be retained despite plausible biases (i.e. unequal justice), there is no valid retributive reason why capital punishment *specifically* should be abolished due to an innate immorality (i.e. equal injustice). The next chapter, and the fourth argument against van den Haag, indirectly addresses that notion by questioning the van den Haagian reason why the death penalty *specifically* should be retained or re-introduced. Although all the counter-arguments in this dissertation have been presented in ascending order of strength, the final counter-argument, however, reverts to the axiomatic assumptions proposed by van den Haag.

CHAPTER IX

THE AXIOMATIC ASSUMPTION EXCEPTION ARGUMENT

IX.I. Introducing the Axiomatic Assumption Exception Argument

The disguised equal distribution response in the previous chapter highlights that the explicit illegitimate authority argument in Chapter VII is unable to find a valid retributive reason why the death penalty, specifically, is inherently immoral and thus should be eliminated (see Chapter VIII). In order for this chapter's argument in this regard to be presented effectively, the van den Haagian axiomatic assumptions require some exploration (see Chapter V).

Van den Haag challenged his opponents to prove incorrect, on retributive grounds, his claim that *unequal justice is always preferable to equal injustice*. As such, his first axiomatic assumption or main pre-condition was that no consequentialist or hybrid reasoning was permitted. This assumption shall not be interfered with, as the purpose of this dissertation is to accept van den Haag's challenge and refute his claim by not using such hybrid or consequentialist reasoning. Similarly, his second assumption of non-comparative notions of punishment and desert are unaffected in so far as it exceeds the parameters of this dissertation.

However, an aspect of van den Haag's *third assumption* of proportionality shall be tested, the importance of which, as a principle for retributivism, has been highlighted throughout. It is not his general conception of desert and punishment (being proportional to the seriousness of the offence and culpability of the offender) that is examined, but rather, his assumption that the death penalty, specifically, is deserved for (first-degree) murder. Although it seems that the basis for removing the death penalty is particularly weak in the arguments presented in previous chapters, the foundation to retain that particular penalty is also questionable (see also Bedau, 1997, p. 520).

IX.II. Van den Haag's Inference of His Third Axiomatic Assumption

As mentioned, van den Haag's third axiomatic assumption is that only (first-degree) murderers deserve a capital sentence. However, if the death penalty should only be reserved for those that commit (first-degree) murder and "the most serious punishments are matched with the most serious offenses" (Murphy, 1979, p.79), there is an unconscious inference that the sentence of death is ranked as *more severe* than the sentence of life imprisonment (i.e. abolitionism or equal injustice). As van den Haag stated earlier in Chapter V, "death must be the greatest of punishments" because "life is the greatest of gifts" (van den Haag & Conrad, 1983, p. 225; see also Devine, 2000; Xinglong, 2005).

There is, however, much debate over which sentence is more severe for the wrongdoer: life imprisonment or the death penalty (for examples, see Kvanvig, 1993; Lavergne, 2003; Mujuzi, 2009; Penal Reform International, 2008; Stokes, 2008). For instance, those with continuous run-ins with the criminal justice system may feel more mentally and emotionally equipped for, or comfortable with, prison life than a death sentence. Alternatively, there may be those who feel so devastated by (even the idea of) life in prison they would prefer death, and thus consider capital punishment *less severe*. A preference for the latter alternative is highly problematic for van den Haag.

IX.III. Van den Haag's Axiomatic Inference Problem

Before addressing the problem that van den Haag's assumption faces in this regard, it is important to comment on the offenders' subjective experience of punishment. Many punishment theorists consider the offenders' experience or the 'subjective view' to be irrelevant with regards to punishment, whereby only the punisher's perspective on the punishment is considered (see Corlett, 2004; Walker, 1991). This is known as the 'objective view'. However, retributivists, in particular, have tended not to analyse too deeply whether the severity of punishment should be understood in terms of a subjective or objective perspective (see, for a recent extensive debate, Kolber, 2009; Simons, 2009).

Similarly, although van den Haag “believe[s] the death penalty, because of its finality, is more feared than [life] imprisonment” (van den Haag, 1986, pp. 1665-1666), it is unclear whether *he* believes death is a punishment more severe than life imprisonment because of a ‘mind-independent’ objective notion of finality, or a ‘mind-dependent’ subjective notion of the offenders’ greater fear (see Nozick, 2001; Popper, 1972; Rorty, 1991). As such, unless otherwise contested by van den Haagians, this dissertation will assume that the offenders’ ‘subjective view’ of the punishment can be utilised in order to meet van den Haag’s challenge. Moreover, when the sentence of death is ascribed to an offender, the severity of that punishment is assumed by the punisher or judicial authority, which may be considered a ‘mind-dependent’ subjective ascription of punishments in general. Thus the ‘subjective view’, one may argue, cannot be so readily dismissed when calculating the desert of the offender.

In cases where the offender considers death less severe due to a ‘subjective view’, a problem arises for van den Haag against his claim that unequal justice is always preferable to equal injustice. For retributivism, *the most severe punishments must be matched with the most severe offences* (see Chapter II). However, if an offender considers and experiences a death sentence as being *less* severe than life imprisonment for the crime of (first-degree) murder, that core retributive principle is violated. As such, on van den Haagian retributive grounds, an injustice has occurred because of the imposition of capital punishment and the execution of a (first-degree) murderer.

It is foreseeable that in spite of this, supporters of van den Haag may continue to defend the use of capital punishment in the belief that the general population views the death penalty as more severe than life imprisonment. Also, they may add the argument that “the advantages, moral or material, outweigh the unintended losses” (Stairs, n.d., para. 13). However, these death penalty supporters would seem, then, to adopt a utilitarian position, their argument being that ‘the greatest good (or utility) is for the greatest number of people’ (Rosen, 2003; see also Ostrow, 2002, for an interesting Wittgensteinian critique). This would replace retributive reasoning for a consequentialist justification of capital punishment, which, in van den Haagian terms, is impermissible.

Alternatively, van den Haagians may suggest that there is no need to eliminate the death penalty in favour of abolitionism because, as in the case where there is racial maldistribution of capital sentencing, at least some offenders are receiving their just deserts which is far better than none. However, in that situation where only some offenders receive their just deserts, as opposed to all of them, the reason for retentionism is that if the distribution were equalised, abolitionism would have no foothold (Chapter VIII). It was not capital punishment that was deemed immoral in *itself*. In this case, however, even if the distribution were rectified as equal and balanced in terms of age, sex, race, religion, culture, nationality, and the like, there is still the matter of an irreconcilable inner subjective experience of capital punishment.

Injustice, within this system, will definitely occur at some point, and so the death penalty will unavoidably and knowingly violate a core retributive principle. As such, capital punishment should be abolished (i.e. equal injustice), as it appears to be retributively immoral *in se*. In addition, for van den Haagians, life imprisonment is a viable option to replace capital punishment. Van den Haag refers to proportional retribution rather than the exact likeness of punishment to crime (or literal retribution, as shown in Chapter II), in his own analogy of *finer* for parking violations (in Chapter V). The reason why the death penalty specifically would be an exception is unsubstantiated.

IX.IV. Concluding the Axiomatic Assumption Exception Argument

This argument highlights subjective experiences. Van den Haag's third assumption inferred that the death penalty is always experienced as more severe than life imprisonment (or abolitionism). However, in the inconclusive debate as to which penalties are worse, it is reasonable and foreseeable that some offenders would prefer to be executed than serve a term of life imprisonment, meaning that capital punishment – at any rate as far as they are concerned – is less severe. Van den Haag also suggests that (first-degree) murder is the most severe crime. In retributivism, certain principles need to be held concerning punishment, one of them being that the most severe punishment is matched with the most severe offences (see Chapter II). If any basic principle is contravened by a punishment – that being the death penalty in

this case – because retributivism is deontological and considers only the innate morality of punishment as described by these principles, capital punishment is designated as retributively immoral *in itself*.

In Chapter VIII the argument presented was that equalising arbitrarily distributed or racially maldistributed capital sentences would render no violation of retributive principles. This chapter discussed the inner subjective experience which leads to an inevitable and knowing violation of retributive principles in spite of equalising distribution. Furthermore, without a more substantive retributive reason to specifically include the death penalty as a viable sentence, an acceptable alternative for the van den Haagians is a proportional form of retributivism, such as life imprisonment. Thus it seems that van den Haag's challenge has at least in part been met as its refutation encompasses pure retributive reasoning, demonstrating that equal injustice (i.e. abolitionism or life imprisonment) may in fact be preferable to unequal justice (i.e. capital punishment).

CHAPTER X

CONCLUSION

X.I. Conclusion

Van den Haag lived long enough to witness judicial support for his conception of justice (Huigens, 2000). Remnants of his demand for justice and his extrication of appeals for equality are visible in numerous U.S. Supreme Court decisions (see, for example, *McCleskey v. Kemp*, 1987; *Pulley v. Harris*, 1984). For over three decades van den Haag restricted the perennial debate on the death penalty, belittled the significance of scientific evidence of racial inequalities in capital sentencing, and unapologetically ignored the very public neo-liberal discourse on the matter.

For abolitionists, capital punishment is immersed within a strange contradiction. The power invested in the government and the judiciary is often distrusted and yet retentionists are willing to enhance that power by giving it the control over life (Sarat, 2002). Moreover, capital punishment is typically viewed via the media as a form of government control over some 'vile' members in the society for society's sake, while abolitionists tend to claim that this judicial act is simply a form of brutal societal revenge (Zimring, 2003).

Van den Haag, nonetheless, utilises individual moral desert to maintain his retributivist position for the death penalty. His position is that moral desert claims are satisfied even when offenders are given an arbitrarily distributed or racially maldistributed capital sentence. This is based on his understanding of moral desert and justice. He argued that justice is the aim of punishment and moral desert is the justification for that punishment. He further asserted that although the death penalty was unequally distributed among (first-degree) murderers, it still served greater retributive justice than if no murderers received their just desert, and was therefore always preferable.

The 'burden of relative disadvantage' response revealed an internal inconsistency within van den Haag's logic. This demonstrated, by way of van den Haag's 'parking fine analogy', that those who were punished by means of an

arbitrary or maldistributed system endured greater disadvantages or additional 'costs' when other equally culpable offenders were not punished. This was a perfectly valid argument except in the case of capital punishment, as there was no further burden to be endured by a person who had been executed.

A death penalty process that distributes racially biased sentences from an authority that is illegitimate is unjust. As this dissertation demonstrated, however, an implicitly illegitimate authority via the response of the public was unsatisfactory. So, an explicit route to determine the authority as illegitimate was established due to the violation of mandates of impartiality. Although the offender's moral desert is unchanged by racial bias, the illegitimacy of the authority and the capital sentencing process rendered the moral desert claims unsatisfied. Even if murderers deserve to be executed, sentencing by such an illegitimate source promoted further injustice as the original desert claims are not satisfied, and undeserved punishment or harm is administered. Here, unequal justice violated retributive principles.

However, according to the van den Haagian assumption that offenders convicted of murder deserve to be executed by the state, the explicit illegitimate authority argument was inadequate and insufficient grounds to abolish the death penalty. The retributive principles that are violated are done so only because of the way that punishment is distributed. If the distribution were then equalised, the retributive principles would be seen to be no longer violated. As the inherent moral or immoral nature of capital punishment cannot change in the van den Haagian view, it is only the inherent nature of arbitrary or racially maldistributed sentences that is actually noted. There is no doubt that racial maldistribution in capital punishment must be dealt with, but discarding the procedure is not the key to this: discriminating against capital punishment in favour of desertion seemed unwarranted.

Van den Haag may have assumed that the infinite nature of death far exceeded in severity a term of life imprisonment, but he failed to consider the wrongdoers' subjective perspective on receiving and enduring these sentences. Due to this subjective view of severity, a difficulty arose in regard to situating capital punishment on a continuum of 'punishment severity', whereby the death penalty's severity becomes virtually indeterminate (and not as self-evident, as van den Haag has suggested). For those that deem capital punishment to be a sentence less severe

than life imprisonment for (first-degree) murder a core principle is violated, as the perpetrators of the most serious crimes do not necessarily receive the most severe penalties. Moreover, as this argument remains solid in the face of equalising distribution, and presents the viability of van den Haag adopting proportional retribution, capital punishment can be considered retributively immoral *in se*. Here capital punishment or unequal justice is *not* preferable to equal injustice (or life imprisonment, or abolitionism). This dissertation presented against the morality of the death penalty has thus met van den Haag's challenge. It appears, then, that whether one refers to retentionist states, such as those in the U.S., or abolitionist countries, such as South Africa, there is no moral weight with which to impose capital punishment on offenders on the grounds of retribution.

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